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No. 2497

**United States Circuit Court  
of Appeals  
For the Ninth Circuit**

In the Matter of

M. BARDE and J. LEVITT, individually,  
and as partners as BARDE & LEVITT,  
Bankrupts.

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**TRANSCRIPT OF RECORD**

On Review of the order of the District Court of the  
United States for the District of Oregon, setting  
aside exempt property.

**Filed**

OCT 19 1914

F. D. Monckton,  
Clerk.





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# United States Circuit Court of Appeals

th Circuit

876

ter of

LT, individually,  
E & LEVITT,  
Bankrupts.

## OF RECORD

the District Court of the  
District of Oregon, setting

723

*Attorneys of Record.*

LL, Yeon Building,  
For the Bankrupts.

and

Henry Building,

For the Trustee of the estate of the Bankrupts.

*In the Matter of*

IN THE DISTRICT COURT OF THE UNITED  
STATES FOR THE DISTRICT OF  
OREGON.

BE IT REMEMBERED, that on the 28th day of August, A. D. 1914, there was duly filed in the District Court of the United States for the District of Oregon, a petition to the United States Circuit Court of Appeals for Review of an order of the District Court of the United States for the District of Oregon, in words and figures as follows, to wit:

**PETITION FOR REVIEW.**

IN THE UNITED STATES CIRCUIT COURT  
OF APPEALS

For the Ninth Circuit.

Petition to Review in Bankruptcy.

In the Matter of

**M. BARDE and J. LEVITT**, individually,  
and as partners as **BARDE & LEVITT**,  
Bankrupts.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Your petitioner, R. L. Sabin, a citizen of the United States, residing in the City of Portland, in the State of Oregon, respectfully shows:

I.

That on the 7th day of March, 1913, the said M.

Barde and J. Levitt, partners as Barde & Levitt, and M. Barde, individually, and J. Levitt, individually, were duly adjudged bankrupts by the District Court of the United States for the District of Oregon, and thereafter on the 1st day of April, 1913, your petitioner was duly elected and appointed trustee of said bankrupt estates, and ever since has been and now is the duly appointed, qualified and acting trustee thereof.

## II.

That at the time of the filing of the petition and schedules in bankruptcy in said District Court said bankrupt, M. Barde, was and still is the owner of lot nine (9) in block fifteen (15) in Goldsmith's Addition to the City of Portland, in Multnomah County, State of Oregon, of the dimensions of fifty (50) feet by one hundred (100) feet, on which there was and is a residence building which was then and is now occupied and used by said Mr. Barde and his family as a home; that the same was and is listed and valued in the schedules of assets filed by said M. Barde on the 15th day of March, 1913, herein at the sum of \$12,000, and was and is claimed by said M. Barde as a homestead and exempt as such under the laws of Oregon.

## III.

That said house and lot was appraised by the appraisers in said bankruptcy proceeding as being worth the sum of \$20,000 and is worth the full of sum of \$12,000 in cash; that the same cannot be divided nor segregated without material injury to the tract, nor

can a homestead of the value of no more than \$1500 be set apart in specie out of said property.

#### IV.

That petitioner as such trustee did not report or set aside said house and lot as a homestead exempt from sale in payment of the debts of said bankrupt, and on the 11th day of April, 1914, filed his petition with Honorable B. N. Hicks, one of the referees in bankruptcy in the District Court of the United States for the District of Oregon, to whom said cause had regularly been referred, praying for an order directing the sale of said lot free from homestead claim of said bankrupt, and that the sum of \$1500 out of the proceeds of such sale be paid to said bankrupt, M. Barde, as and for his homestead rights in said lot, or for a re-appraisement and valuation of said house and lot and an order requiring said bankrupt to pay to your petitioner as such trustee such sum as said re-appraisement and valuation may exceed \$1500, in default of which the trustee be directed to sell said land.

#### V.

That after due notice to all the creditors of said bankrupts of a meeting to consider said petition, a hearing was duly had thereon before said referee in bankruptcy on the 30th day of April, 1914, and an order was duly made, rendered and entered by said referee authorizing and directing R. L. Sabin as trustee in bankruptcy of said bankrupt estates to sell said lot at public auction, after legal notice of sale, to the highest bidder for cash, for not less than \$1500, unless said M. Barde

shall on or before the date of such sale pay to said trustee the sum of \$10,500 in cash for the benefit of the creditors of said estate.

## VI.

That thereafter on the 7th day of May, 1914, a certificate of review of said proceedings and order was duly granted to and filed in the District Court of the United States for the District of Oregon, by the said referee, and thereafter on or about the 8th day of June, 1914, an order was duly made and entered in and by said District Court reversing the order of said referee. That said order of said District Court, omitting formal parts, is as follows:

"This cause was heard upon the review of the order of the referee in bankruptcy herein directing that lot 9, in block 15, in Goldsmith's Addition to the City of Portland, Multnomah County, Oregon, belonging to the bankrupt M. Barde, be sold by the trustee, and upon the motion of the trustee to confirm said order of the referee, and was argued by Mr. R. R. Giltner, of counsel for said bankrupt, and by Mr. Thomas G. Greene, of counsel for said trustee. And it appearing to the court that said property was claimed by the said bankrupt to be exempt and that said property is exempt under the bankrupt law;

It is therefore ordered and adjudged that the order of the referee directing the sale of said property be, and the same is hereby, overruled, and that said property be, and the same is hereby, set aside to the said bankrupt, M. Barde, as exempt property."

**VII.**

That said order was and is erroneous as a matter of law in that:

1. The statutes of the State of Oregon (Lord's Oregon Laws, Sections 221, 222, 224 and 225) upon which your petitioner relied for his right to sell said house and lot, give him, in right of his status under section 47 of the bankrupt law, the right, option and privilege of realizing and appropriating for the creditors of the bankrupt all of the value of said homestead in excess of \$1500.
2. That petitioner is entitled to sell said homestead, regardless of its area or dimensions, upon payment to said bankrupt of the sum of \$1500.

Wherefore your petitioner feeling aggrieved because of said order, asks that the same may be revised in matter of law, by this Honorable Court, as provided in Sections 24-b of the Bankruptcy Act, and the rules of practice in such case provided, and that the same be reversed, and for such other and further relief as may be just and proper.

**R. L. SABIN,**

Petitioner.

**BAUER & GREENE and**

**A. H. McCURTAIN,**

Solicitors for Petitioner.

United States of America,      )  
State and District of Oregon,    )ss.  
Multnomah County.                )

R. L. Sabin makes oath and says that he is the

petitioner above named, and the foregoing petition for revision and review is true as he verily believes.

R. L. SABIN.

Subscribed and sworn to before me this 27th day of August, 1914.

(Notarial Seal)

SIDNEY TEISER,  
Notary Public for Oregon.

Due and legal service of the foregoing petition in Portland, Oregon, is hereby admitted and accepted this 28th day of August, 1914.

GILTNER & SEWELL,  
Solicitors for M. Barde.

Filed August 28, 1914. G. H. MARSH, Clerk.

And, to wit: on the 7th day of May, 1914, there was duly filed in said court, a certificate by the referee to the court for review, together with petition of trustee for sale of real property, order of referee for sale of real property, in words and figures as follows, to wit:

**REFEREE'S CERTIFICATE.****IN THE DISTRICT COURT OF THE UNITED  
STATES FOR THE DISTRICT OF  
OREGON.**

**In the Matter of**

**M. BARDE and J. LEAVITT, partners as  
BARDE & LEAVITT, and M. BARDE  
individually, and J. LEAVITT individ-  
ually,**

**Bankrupts.**

To the Honorable, the District Judges of the above entitled court:

I, B. N. Hicks, the referee in bankruptcy in charge of this proceeding, do hereby certify:

That in the course of such proceeding the foregoing order and decree was made and entered on the 30th day of April, 1914, and thereupon on said day, feeling aggrieved thereat, said bankrupt, M. Barde, by R. R. Giltner, of counsel, demanded a review, which was granted.

That a summary of the evidence is contained in the findings included in said order and decree.

That the questions presented on this review are:

First. Is the bankrupt, M. Barde, entitled to have the whole of lot 9, in block 15, in Goldsmith's Addition to the City of Portland, Multnomah County, Oregon,

set apart as a homestead exempt from sale for payment of his debts notwithstanding the value thereof exceeds \$1500?

Second. Has this court, as a court of bankruptcy, power to authorize and direct the sale of said property by the trustee for not less than \$1500, for the benefit of the creditors of said bankrupt to the extent of the whole of the proceeds of such sale in excess of \$1500?

I hand up herewith, for the information of the judge, all papers filed with me herein which are pertinent to this review, to wit: the petition of R. L. Sabin as trustee, for the sale of said land. The schedules of said bankrupts and the report of the appraisers of said estate have heretofore been filed with the clerk of this court.

Dated Oregon City, May 2, 1914.

Respectfully submitted,

B. N. HICKS,

Referee in Bankruptcy.

Filed May 7, 1914. A. M. CANNON, Clerk.

**PETITION OF TRUSTEE FOR SALE OF  
REAL PROPERTY.****IN THE DISTRICT COURT OF THE UNITED  
STATES FOR THE DISTRICT OF  
OREGON.****In the Matter of****M. BARDE and J. LEAVITT, partners, as  
BARDE & LEAVITT, and M. BARDE  
individually, and J. LEAVITT individ-  
ually,****Bankrupts.****HON. B. N. HICKS, referee in Bankruptcy.**

Now comes R. L. Sabin, the duly appointed, qualified and acting trustee of the above entitled bankrupt estates, and respectfully shows:

**I.**

That said bankrupt, M. Barde, is the owner of lot nine (9), in block fifteen (15), in Goldsmith's Addition to the City of Portland, in Multnomah County, State of Oregon, which was listed in the schedules of said bankrupt filed herein at an estimated value of \$12,000, and was claimed by said bankrupt as exempted under the laws of Oregon as a homestead.

**II.**

That said property consists of one city lot approximately fifty by one hundred feet, and a house occupied

by said bankrupt as a home, and was appraised by the appraisers herein as being worth the sum of \$20,000.

### III.

That your petitioner, as trustee in bankruptcy, has not set aside nor reported said lot as a homestead exempt from sale in payment of the debts of said bankrupt, for the reason that the same greatly exceeds in value the maximum valuation of \$1500 of a homestead provided by the laws of Oregon, and a homestead of the value of \$1500 only, cannot be segregated and set apart out of said lot without material injury, and it is for the best interests of all concerned that the same be held and sold as a single tract.

### IV.

That it would be for the benefit of said estate that said real property be sold as an entire tract or parcel at public auction to the highest bidder for cash in hand.

Wherefore petitioner prays that a meeting of creditors be called on ten days' notice to consider the sale of said real property as aforesaid; that an order be made directing the sale of said lot free from homestead claim of said bankrupt, and that the sum of \$1500 out of the proceeds of such sale be paid to said bankrupt, M. Barde, as and for his homestead rights; and that in case this honorable court may decree it proper, appraisers be appointed by the referee to re-appraise and fix a valuation of said land and that said bankrupt be permitted by order of court to pay to the trustee within a time to be fixed, such sum as such valuation and

appraisement may exceed \$1500, in default of which the trustee be directed to sell said land as aforesaid; and for such other, further or different order in the premises, as upon said hearing, the court may deem just and equitable.

Dated April 10, 1914.

BAUER & GREENE and  
A. H. McCURTAIN,  
Solicitors for Trustee.

State of Oregon,      )  
                            )  
Multnomah County,    ) ss.

I, R. L. Sabin, being first duly sworn, say that I am the petitioner above named, and trustee of the above entitled bankrupt estate; that the foregoing petition is true, as I verily believe.

R. L. SABIN.

Subscribed and sworn to before me this 10th day of April, A. D. 1914.

(Notarial Seal)

H. KETTERMAN,  
Notary Public for Oregon.

State of Oregon,      )  
                            )  
County of Multnomah. ) ss.

Due service of the within petition is hereby accepted in Multnomah County, Oregon, this 10th day of April, 1914, by receiving a copy thereof, duly certified to as

such by T. G. Greene, attorneys for petitioner and trustee.

**GILTNER & SEWELL,**  
Attorneys for bankrupt, M. Barde.

Filed May 7, 1914. A. M. CANNON, Clerk.

**ORDER OF REFEREE FOR SALE OF REAL  
PROPERTY.**

**IN THE DISTRICT COURT OF THE UNITED  
STATES FOR THE DISTRICT OF  
OREGON.**

In the Matter of

**M. BARDE and J. LEAVITT, partners, as  
BARDE & LEAVITT, and M. BARDE  
individually, and J. LEAVITT individ-  
ually,**

**Bankrupts.**

This cause coming on regularly to be heard this day before the undersigned referee in bankruptcy, to whom this cause was heretofore duly referred, on the petition of R. L. Sabin as trustee of the above entitled bankrupt estates for the sale of lot 9, in block 15, in Goldsmith's Addition to the City of Portland, Multnomah County, State of Oregon, heretofore filed herein, petitioner appeared by Thomas G. Greene, of counsel, and the bankrupt, M. Barde, appeared in person and by R. R. Giltner, of counsel.

And it satisfactorily appearing to the undersigned referee in bankruptcy and the court finds as follows:

## I.

That at the time of the filing of the petitions and schedules of said bankrupts herein, M. Barde was the owner of said lot and then and now with his family occupies the same as a home; that the same was and is listed in his schedules herein at an estimated valuation of \$12,000, and was therein claimed by said M. Barde as exempted under the laws of Oregon as a homestead, and now at this time and upon this hearing, in open court, his counsel claims that said property and the whole thereof, regardless of its value, is, and should be, exempted from sale by the trustee as the homestead of said bankrupt, M. Barde.

## II.

That said property consists of one city lot approximately 50 feet by 100 feet in size, on which said bankrupt, prior to his bankruptcy, erected a house; that said house and lot was appraised by the appraisers herein as being worth the sum of \$20,000; that the trustee herein has not reported nor set aside said house and lot as a homestead exempt from sale in payment of the debts of said bankrupt; that the same cannot be divided nor segregated without material injury to the tract, nor can a homestead of the value of no more than \$1500 be set apart in specie out of said property. That said property is actually worth the sum of \$12,000.

### III.

That more than ten days prior to the 30th day of April, 1914, printed notices of this meeting of the creditors of said bankrupts, for the purpose of this hearing and of the proposed sale of said property, were duly mailed to all of the creditors of said bankrupts.

And from the foregoing facts the court concludes as follows:

#### FIRST.

That said bankrupt, M. Barde, is entitled to a homestead exemption to the extent and amount of \$1500, and no more, out of said lot 9, in block 15, in Goldsmith's Addition to the City of Portland, Multnomah County, State of Oregon, and said sum of \$1500 can be set apart to said bankrupt only by the sale of said property, which is incapable of division or segregation without material injury to the tract.

#### SECOND.

That R. L. Sabin as trustee in bankruptcy of said estate is and ever since the adjudication of said M. Barde as a bankrupt herein, has been vested with the right and title to said property for the benefit of the creditors of said bankrupt, subject to a homestead exemption to the extent and value of \$1500 and no more, and said trustee is entitled to all of the proceeds of the sale of said property in excess of said sum of \$1500, to wit: the sum of \$10,500.

**THIRD.**

That said property should be sold at public auction to the highest bidder for cash in hand, and \$1500 of the proceeds set aside and paid to M. Barde as and for his homestead exemption, unless said M. Barde shall, prior to such sale, pay or cause to be paid to said trustee the said sum of \$10,500, in which event said house and lot should be set apart as the homestead of the said bankrupt, free and exempt from all further claims of the trustee in bankruptcy.

Now, therefore, based on the foregoing findings and conclusions, it is

**ORDERED** and **DECREEED** that R. L. Sabin as trustee in bankruptcy of said bankrupt estates, be and he is hereby authorized and directed to sell at public auction the said lot 9, in block 15, in Goldsmith's Addition to the City of Portland, in Multnomah County, State of Oregon, and all of the right, title and interest of M. Barde therein and thereto; that said sale be made at the door of the county court house, in the City of Portland, Multnomah County, Oregon, between 9 o'clock in the morning and 4 o'clock in the afternoon; that notice thereof particularly describing said property, be given by posting a written or printed notice for four weeks successively in three public places of Multnomah County, Oregon, and publishing a copy thereof once a week for the same period in a newspaper of the same county, and that said property be sold to the highest bidder for cash, for not less than \$1500, subject to the approval and confirmation of this court.

It is further ORDERED and DECREED that if said M. Barde shall on or before such sale pay to said trustee the sum of \$10,500 in cash for the benefit of the creditors of the estate, said sale shall not be made and said entire parcel of land shall be thereupon set apart as the homestead of said M. Barde free and exempt from all further claims of said trustee in bankruptcy.

B. N. HICKS,  
Referee in Bankruptcy.

Filed May 7, 1914. A. M. CANNON, Clerk.

And afterwards, to wit: on the 13th day of May, 1914, there was duly filed in said court a motion to confirm order of referee, in words and figures as follows, to wit:

**MOTION TO CONFIRM ORDER OF  
REFEREE.**

**IN THE DISTRICT COURT OF THE UNITED  
STATES FOR THE DISTRICT OF  
OREGON.**

In the Matter of

**M. BARDE and J. LEAVITT, partners as  
BARDE & LEAVITT, and M. BARDE  
individually, and J. LEAVITT individ-  
ually,**

**Bankrupts.**

Now comes R. L. Sabin as trustee of the above entitled bankrupt estates, by Bauer & Greene and A. H.

*In the Matter of*

McCurtain, his solicitors, and moves the Honorable District Court for an order and decree ratifying, approving and confirming the order and decree of Honorable B. N. Hicks, referee in bankruptcy, dated the 2nd day of May, 1914, and filed herein on the 7th day of May, 1914, authorizing and directing the sale by said trustee at public auction of all the right, title, interest and estate of M. Barde in and to lot nine (9), in block fifteen (15), in Goldsmith's Addition to the City of Portland, in Multnomah County, State of Oregon, as therein provided.

This motion is based on the report and certificate of said referee and the papers on file in the above entitled cause.

May 8, 1914.

BAUER & GREENE and  
A. H. McCURTAIN,  
Solicitors for Trustee.

State of Oregon,              )  
                                    )  
County of Multnomah.        ) ss.

Due service of the within motion is hereby accepted in Multnomah County, Oregon, this 13th day of May, 1914, by receiving a copy thereof, duly certified to as such, by T. G. Greene, attorney for Trustee.

R. R. GILTNER,  
Attorneys for M. Barde, Bankrupt.

Filed May 13, 1914. A. M. CANNON, Clerk.

And afterwards, to wit: on Monday, the 8th day of June, 1914, the same being the 85th Judicial day of the

regular March, 1914, term of said court; present: the Honorable Robert S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

**ORDER OVERRULING ORDER OF  
REFEREE AND ALLOWING  
EXEMPTIONS.**

**IN THE DISTRICT COURT OF THE UNITED  
STATES FOR THE DISTRICT OF  
OREGON.**

No. 2288.

**IN BANKRUPTCY ORDER.**

In the Matter of

**M. BARDE and J. LEAVITT, individually  
and as partners under the firm name of  
BARDE AND LEAVITT,**

**Bankrupts.**

This cause was heard upon the review of the order of the referee in bankruptcy herein directing that lot 9, in block 15, in Goldsmith's Addition to the City of Portland, Multnomah County, Oregon, belonging to the bankrupt, M. Barde, be sold by the trustee, and upon the motion of the trustee to confirm said order of the referee, and was argued by Mr. R. R. Giltner, of counsel for said bankrupt, and Mr. Thomas G. Greene, of counsel for said trustee. And it appearing to the court that said property was claimed by the said bank-

rupt, M. Barde, to be exempt and that said property is exempt under the bankruptcy law;

**IT IS THEREFORE ORDERED AND ADJUDGED** that the order of the referee directing the sale of said property be, and the same is hereby overruled, and that said property be and the same is hereby set aside to the said bankrupt, M. Barde, as exempt property.

WITNESS the Honorable Robert S. Bean, Judge of said Court, and the seal thereof at Portland, in said District, this June 8, 1914.

(Seal)

**A. M. CANNON**, Clerk.

By G. H. MARSH, Deputy.

Filed June 8, 1914. A. M. CANNON, Clerk U. S. District Court.

And, to wit: on the 16th day of September, 1914, as of and for June 8, 1914, there was duly filed in said court, an opinion, in words and figures as follows, to wit:

### OPINION.

### IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

In the Matter of

M. BARDE and J. LEVITT, partners as  
BARDE & LEVITT, and M. BARDE  
individually, and J. LEVITT individually,  
Bankrupts.

Portland, Oregon, (Monday) June 8, 1914.

R. S. BEAN, District Judge (Oral) :

Barde was adjudged a bankrupt. He claims as exempt under the homestead law of this state the lot upon which his dwelling is located, and which it is stated in his schedule and conceded for the purposes of this case to be worth \$12,000. The Trustee in Bankruptcy insists that the limit of the homestead statute is \$1500.00 in value.

Now, the language of the homestead law is indefinite and uncertain and quite difficult, if not impossible, to reconcile. I do not think it can be determined with any certainty until we have an adjudication by a court of last resort.

The first section defines the homestead as the actual abode of the family. Section 222 says it shall not exceed \$1500.00 in value, nor 160 acres in extent, if not located in town or city laid off into blocks and lots, and if located in any such town or city, then it shall not exceed one block, but in no instance shall such homestead be reduced to less than twenty acres nor one lot, regardless of the value. So it will be seen from this section it begins by stating that the homestead shall not exceed \$1500.00 in value, and winds up with a provision that in no instance shall it be reduced to less than twenty acres nor one lot, regardless of the value.

Sections 224 and 225 provide for the method of procedure in enforcing a lien against an alleged homestead and provide that when the homestead is levied upon, the claimant may notify the officer, and such officer shall thereupon notify the creditor, and if such

homestead shall exceed the minimum in this act, which I take it means "not less than twenty acres nor one lot regardless of value," and if he deems it of greater value than \$1500.00, he may direct the sheriff to proceed in a certain manner, or in lieu of that he may pay the debtor \$1500.00 and sell the homestead under the execution.

Now, it would seem from sections 224 and 225 that the law contemplated that the homestead should not exceed under any circumstances \$1500.00 in value, but section 222 says in plain and definite language that it shall in no instance be reduced to less than twenty acres or one lot, regardless of value, and as section 222 defines the homestead and sections 224 and 225 provide a method of procedure in case of levy, the best interpretation that I can give to the act is that it intended to exempt one lot in a city or town regardless of its value, and therefore under that view the bankrupt is entitled to this exemption.

Now, this is a harsh conclusion, but if it is the law, the courts have no alternative but to enforce it. In any event this is probably as good a case as will arise for the purpose of testing the question in an appellate court.

And afterwards, to wit: on the 28th day of August, 1914, there was duly filed in said court, a motion for allowance of petition for revision, in words and figures as follows, to wit:

MOTION FOR ALLOWANCE OF PETITION  
FOR REVISION.

IN THE DISTRICT COURT OF THE UNITED  
STATES FOR THE DISTRICT OF  
OREGON.

APPLICATION FOR ALLOWANCE OF  
PETITION FOR REVISION.

In the Matter of

M. BARDE and J. LEVITT individually,  
and as partners as BARDE & LEVITT,  
Bankrupts.

To the Honorable Judges of the above entitled court:

The within named petitioner, R. L. Sabin, trustee in bankruptcy of the above entitled bankrupts, conceiving himself aggrieved by the order entered on the 8th day of June, 1914, in the above entitled proceeding, doth hereby present his petition for a revision and review of said order to the United States Circuit Court of Appeals for the Ninth Circuit, and prays that his said petition may be allowed, and that said petition for revision and review, accompanied by a duly authenticated transcript of the record and proceedings and papers upon which said order was made, may be sent to said Circuit Court of Appeals for the Ninth Circuit.

Dated Portland, Oregon, August 28, 1914.

BAUER & GREENE and  
A. H. McCURTAIR,  
Solicitors for Petitioner.

State of Oregon,              )  
                                  ) ss.  
County of Multnomah.        )

Due service of the within application is hereby accepted in Multnomah County, Oregon, this 28th day of August, 1914, by receiving a copy thereof, duly certified to as such by Thos. G. Greene, solicitor for petitioner.

**GILTNER & SEWELL,**  
Attorneys for M. Barde, Bankrupt.

Filed August 28, 1914. G. H. MARSH, Clerk.

And afterwards, to wit: on the 28th day of August, 1914, there was duly filed in said court, a notice of presentation of petition for review, in words and figures as follows, to wit:

**NOTICE OF PRESENTATION OF PETITION  
FOR REVIEW.**

**IN THE DISTRICT COURT OF THE UNITED  
STATES FOR THE DISTRICT OF  
OREGON.**

**NOTICE OF PRESENTATION OF PETITION  
FOR REVISION.**

In the Matter of

**M. BARDE and J. LEVITT individually,  
and as partners as BARDE & LEVITT,  
Bankrupts.**

To M. Barde, the above named bankrupt, and Giltner & Sewall, his solicitors:

You, and each of you, are hereby notified that on Monday, the 31st day of August, 1914, at the hour of 10 o'clock A. M., or soon thereafter as counsel can be heard, the undersigned as solicitors for R. L. Sabin, trustee in bankruptcy of the above named bankrupts, will present the petition to the United States Circuit Court of Appeals for the Ninth Circuit, of said R. L. Sabin for revision and review, together with petition of said R. L. Sabin for the allowance thereof, to the Honorable R. S. Bean, one of the judges of the District Court of the United States for the District of Oregon. Said petitions are hereto attached and are herewith served upon you.

Portland, Oregon, August 28, 1914.

BAUER & GREENE and  
A. H. McCURTAIN,  
Solicitors for Petitioner.

State and District of Oregon, )  
                                    ) ss.  
County of Multnomah.       )

Due and legal service of the foregoing notice, together with said petition for revision and said petition for the allowance thereof, and receipt of copies thereof duly certified by Thomas G. Greene, one of the solicitors for petitioner, is hereby accepted and acknowledged at Portland, Oregon, this 28th day of August, 1914.

GILTNER & SEWALL,  
Solicitors for M. Barde.

Filed August 28, 1914. G. H. MARSH, Clerk.

And afterwards, to wit: on Monday, the 31st day of August, 1914, the same being the 49th Judicial day of the regular July, 1914, term of said court; present: the Honorable Robert S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

**ORDER ALLOWING REVISION AND DESIGNATING RECORD ON REVIEW.**

**IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.**

**ORDER ALLOWING PETITION FOR REVISION AND DESIGNATING RECORD ON REVIEW.**

**In the Matter of**

**M. BARDE and J. LEVITT individually,  
and as partners as BARDE & LEVITT,  
Bankrupts.**

On this, Monday, the 31st day of August, 1914, this cause coming on regularly to be heard on the application of R. L. Sabin as trustee in bankruptcy of the above entitled bankrupts for an order allowing his petition to the United States Circuit Court of Appeals for the Ninth Circuit for a revision and review of the order of this court made and entered on the 8th day of June, 1914, in the above entitled cause, and it appearing that due notice of such petition and application has been given to said bankrupt, M. Barde, it is

*Ordered* that said petition for revision and review be allowed as prayed for, and the following papers are hereby designated as the record used on the hearing and determination of the matter in this court, and such as are necessary for the consideration and determination of the question presented for review by said petition in said Circuit Court of Appeals for the Ninth Circuit, viz.:

1. Certificate of B. N. Hicks, referee, on petition for revision by this court, including
2. Petition of R. L. Sabin, as trustee in bankruptcy, for an order of sale of bankrupt's homestead;
3. Findings of fact, conclusions of law and order of referee on said petition.
4. Motion of R. L. Sabin as trustee for confirmation of order of referee.
5. Order made and entered June 8, 1914, by this court reversing the order of the referee and directing that the homestead claimed by the bankrupt, M. Barde, be set aside to him as exempt.
6. Opinion of Honorable R. S. Bean, District Judge, in deciding said matter.
7. Application of R. L. Sabin as trustee for allowance of his petition to the United States Circuit Court of Appeals for the Ninth Circuit for revision and review of said order of June 8, 1914.
8. Notice of presentation of petition for revision, and proof of service thereof.

9. This order allowing said application and designating papers for the record on such review.

R. S. BEAN,  
District Judge.

Filed August 31, 1914. G. H. MARSH, Clerk.

UNITED STATES OF AMERICA, )  
                                       ) ss.  
DISTRICT OF OREGON,          )

I, G. H. Marsh, Clerk of the District Court of the United States, for the District of Oregon, do hereby certify that the foregoing transcript of record in the matter of M. Barde and J. Levitt, individually and as partners, as Barde & Levitt, Bankrupts, has been prepared by me in accordance with the law and the rules of this court, and in accordance with the directions of the order allowing the petition for review, and that the same is a true and complete transcript of the record and proceedings as directed by said order had in said court and in said cause as the same appear of record and on file at my office, and in my custody.

And I further certify that the cost of the foregoing record is \$..... and that the same has been paid by the petitioner, R. L. Sabin, Trustee.

In testimony whereof I hereunto set my hand and affix the seal of said court at Portland, in said district, on the.....day of....., 1914.

.....

Clerk.

No. 2497

In the United States Circuit  
Court of Appeals

For the Ninth Circuit

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In the Matter of M. BARDE and J.  
LEVITT, individually and as partners  
as BARDE & LEVITT,  
Bankrupts.

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**APPELLANT'S BRIEF**

On review of the order of the District Court of the  
United States for the District of Oregon, setting aside  
exempt property.

BAUER & GREENE and  
A. H. McCURTAIR,  
Solicitors for Trustee and Appellant.

Filed

JAN 20 1915

R. D. Monckton,  
Clerk.



# In the United States Circuit Court of Appeals

For the Ninth Circuit

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In the Matter of M. BARDE and J.  
LEVITT, individually and as partners  
as BARDE & LEVITT,  
Bankrupts.

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## APPELLANT'S BRIEF

On review of the order of the District Court of the United States for the District of Oregon, setting aside exempt property.

## STATEMENT.

Barde & Leavitt, as partners and as individuals, were adjudged bankrupts March 7, 1913. R. L. Sabin was appointed trustee April 1, 1913, and is the appellant herein. In his schedule of assets filed in the District Court March 15, 1913, M. Barde listed lot 9 in block 15 in Goldsmith's Addition to the City of Portland, Multnomah County, Oregon, being one city lot 50 feet by 100 feet in dimensions, on which there was and now is a dwelling house, then and now occupied by said bankrupt and his family as a home. The bankrupt valued the same at \$12,000, and claimed an exemption thereof

as a homestead under the laws of Oregon. Subsequently the appraisers appointed in the bankruptcy proceedings valued the same at \$20,000. The bankrupts attempted to compound their debts but their proposed composition was not confirmed. (*In re Barde*, 207 Fed. 654). The trustee in bankruptcy did not report or set aside the house and lot as a homestead exempt from sale, and on April 11, 1914, filed his petition with the referee in bankruptcy praying for an order directing the sale thereof free from the homestead claim of the bankrupt, and that the sum of \$1500 out of the proceeds of such sale be paid to the bankrupt as and for his homestead rights therein, or for a reappraisement and valuation of the property and an order requiring the bankrupt to pay the trustee such sum as said reappraisement and valuation may exceed \$1500. After regular proceedings on said petition the referee directed a sale of the property at public auction in the usual manner subject to confirmation, for not less than \$1500, said sum to be set aside and paid to the bankrupt as and for his homestead exemption. The referee found the value of the house and lot to be \$12,000, and further ordered that in case the bankrupt paid to the trustee, on or before the sale, the sum of \$10,500 in cash for the benefit of the creditors of the estate, said sale should not be made and the entire parcel of land thereupon be set apart as the homestead of the bankrupt exempt from all further claim of said trustee.

The referee certified the matter to the District Court, where the trustee moved to confirm the report and order. On June 8, 1914, the District Court reversed the referee and decreed that said property be set aside to the bankrupt as exempt. On August 28, 1914, the trustee

filed his petition for review of said order of the District Court and on August 31, 1914, the same was allowed.

## SPECIFICATIONS OF ERROR.

The order and decree of the District Court was and is erroneous as a matter of law in that:

*First.* The statutes of the State of Oregon (Lord's Oregon Laws, Sections 221, 222, 223, 224 and 225) upon which petitioner, the trustee in bankruptcy, relied for his right to sell said house and lot, give him, in right of his status under section 47 of the Bankrupt Law, the right, option and privilege of realizing and appropriating for the creditors of the bankrupt all of the value of said homestead in excess of \$1500.

*Second.* That the trustee in bankruptcy is entitled to sell said homestead, regardless of its area or dimensions, upon payment to said bankrupt of the sum of \$1500.

## ARGUMENT.

The following is the Homestead Law of Oregon as comprised in Chapter II of Title III, Volume I, Lord's Oregon Laws:

### **“§221. HOMESTEADS EXEMPT—MUST BE ACTUAL ABODE.**

The homestead of any family shall be exempt from judicial sale for the satisfaction of any judgment hereafter obtained. Such homestead must be the actual abode of, and owned by such family or some member thereof.

**"§222. EXTENT OF HOMESTEAD EXEMPTION.**

Such homestead shall not exceed \$1,500 in value, nor exceed one hundred and sixty acres in extent, if not located in town or city laid off into blocks and lots; if located in any such town or city, then it shall not exceed one block; but in no instance shall such homestead be reduced to less than twenty acres nor one lot, regardless of value.

**"§223. MORTGAGE LIEN ENFORCED AGAINST HOMESTEAD.**

This act shall not apply to decrees for the foreclosure of any mortgage properly executed; but if the owners of such homestead be married, then it shall be executed by husband and wife.

**"§224. CLAIM OF HOMESTEAD, UPON LEVY-APPRAISEMENT.**

When any officer shall levy upon such homestead, the owner thereof, wife, husband, agent or attorney of such owner, may notify such officer that he claims such premises as his homestead, describing the same by metes and bounds, lot or block, or legal subdivision of the United States; whereupon such officer shall notify the creditor of such claim, and if such homestead shall exceed the minimum in this act, and he deem it of greater value than \$1,500, then he may direct the sheriff to select three disinterested householders of the county, who shall examine and appraise such homestead, under oath, commencing with the twenty acres or lot upon which the dwelling is located, appraising such lot or twenty acres separately;

and if the same exceed \$1,500, then the sheriff shall proceed to sell all in excess of \$1,500 by lots or smallest legal subdivisions, offering them in the order directed by the judgment debtor, if he chooses to direct; otherwise, he shall sell the same as aforesaid, so as to leave the homestead as compact as possible.

#### **“§225. WHEN EXECUTION CREDITOR MAY SELL HOMESTEAD.**

In lieu of the proceedings aforesaid, the execution creditor may at any time pay the execution debtor the sum of \$1,500, and proceed to sell the homestead as he might heretofore have done, adding the said \$1,500 to his lien, but the money aforesaid shall be exempt from execution.

#### **“§226. HOMESTEAD CONTINUES EXEMPT AFTER DEATH.**

The homestead aforesaid shall be exempt from sale on any judicial process after the death of the person entitled thereto for the collection of any debts for which the same could not have been sold during his lifetime, but such homestead shall descend as if death did not exist.”

Prior to 1893, there was no homestead exemption in Oregon. The residence occupied by the head of a family could be levied upon and sold for the satisfaction of a judgment against him the same as any other real property. In that year of panic and financial distress the legislature passed the law entitled: “An Act to Ex-

empt Homesteads from Attachment and Judicial Sale," approved February 21, 1893 (Laws of Oregon, 1893, pp. 93-94). In 1905, a slight amendment to the first section, which does not affect the pending question, was made, and it now constitutes the sections in Lord's Oregon Laws above quoted.

The case squarely presents the question whether a bankrupt is entitled by that law to retain his homestead free from claims of creditors where it consists of but one city lot incapable of division worth more than \$1500.

Homestead exemption laws exist in most of the states and give heads or members of families exemptions either in money or land ranging from a few hundreds to five thousand dollars, the average being somewhere between \$1000 and \$2000, but we have found no law with similar wording to that of the Oregon statute in question. Its object and intention is similar, but the language in which that intention is attempted to be expressed is like nothing else ever before enacted, and this case is therefore one of first impression. Little aid is to be found in decisions construing other homestead laws. The Oregon supreme court has stopped just short of deciding the point, but held that in view of sections 224 and 225, Lord's Oregon Laws, a creditor desiring to subject a homestead to a mechanic's lien, on the theory that its value is in excess of \$1500 has the burden of proving such value.

Davis v. Low, 66 Or. 599; 135 Pac. 314.

In a case involving the right of a bankrupt to a homestead exemption out of the proceeds of the sale of

her homestead on a mortgage foreclosure in excess of the mortgage debt, *Gilbert, Circuit Judge*, decided that the bankrupt was entitled to the proceeds of her homestead up to the sum of \$1500 after payment of the mortgage debt and costs of foreclosure.

*In re Barrett*, 140 Fed. 569; 16 Am. B. R. 46.

A case more nearly in point, and one which is authority for the procedure adopted in this case, came to this court on petition for revision of the proceedings of the District Court of Idaho directing the sale of the homestead of a bankrupt. The law of Idaho exempts a homestead to the value of \$5000. The homestead in question was appraised at \$9000 and was found incapable of segregation or division, and the court decreed its sale unless the bankrupt should pay the excess of \$4000 to the trustee. The decree further provided that in case of sale the land should not be sold for less than \$5000, which sum be paid to the bankrupt, the excess of the proceeds, if any, to become a part of the assets of the estate for distribution among creditors in due course. In affirming the decree of the lower court, *Wolverton, District Judge*, who wrote the opinion of the Court of Appeals, said:

“It seems to be in conformity even with the Idaho statutes that, if the land is worth more than the value of a homestead, to-wit, \$5,000, it should be determined what its value is. This the court did; but, prior to directing the sale, it extended to the exemptioner the right to retain the homestead by paying to the trustee the amount

that it was worth over and above the \$5,000 exemption. This judgment of the court is assigned as error. We are of the opinion, however, that it is the policy of the Bankruptcy Act that the exemptioner should have the exemption in specie when it can be set aside to him. *In re Manning* (D. C., S. Car.) 10 Am. B. R. 498, 123 Fed. 180. That was what the court endeavored to do in the present case. The procedure by which the value of the property was ascertained seems to have been regular, and there is scarcely a question made but that the homestead claimed was worth approximately \$9,000. We are also of the opinion that, by reason of the court's authority touching the manner of setting aside the homestead, it was empowered to require the property to be sold in the event that the exemptioner was unable or declined to pay the \$4,000 surplus into the estate. On this phase of the controversy, therefore, we hold that there was no error."

**Bank of Nez Perce v. Pindel, 193 Fed. 917; 28 Am. B. R. 69.**

While the value or amount of the exemption to be allowed to a bankrupt depends upon the State law, the method of ascertaining the value of the property claimed as exempt, or of setting apart the property, is not governed by such law, but by the bankruptcy law, and the property may be sold by the trustee under decree of the bankruptcy court, the bankrupt receiving his exemption in money out of the proceeds.

**In re Lynch, 101 Fed. 579; 4 Am. B. R. 262.**

A statute, like any other document, must be construed as a whole by the four corners, and if possible effect must be given to every provision so as to harmonize the whole. Undue prominence and emphasis is not to be given to any particular word or phrase whereby discord and confusion is introduced among other parts of the statute. There is probably not another homestead statute where this rule of construction must be literally "on the job" all of the time in getting at the true intent of the legislature so much as it has to be in this inquiry. But the faithful application of the rule, along with some others which hereinafter will be referred to, evolves sense and reason out of what at first reading, appears to have little of either.

Section 221 of the law defines the homestead right and limits it to the actual abode owned by a family or some member thereof.

Section 222 defines the extent of the homestead exemption and presents the first difficulty in the construction of the act, for the first declaration therein: "Such homestead shall not exceed \$1500 in value" is followed by a limitation as to area concluding with the clause: "But in no instance shall such homestead be reduced to less than \* \* \* one lot regardless of value." There is a rule of construction to the effect that where there is an irreconcilable conflict between different parts of the same act, the last in order of position must control (26 Am. & Eng. Enc. Law 2d Ed. 619; 36 Cyc. 1130), so if the broad rule of construing by the four corners of the whole act be lost sight of here, and the mind concentrated upon this section alone, the conclusion must be that the bankrupt is entitled to

his homestead, since it consists of no more than one city lot, whether it be worth \$1200 or \$12,000 or \$12,000,000. But the rule applicable to conflicting clauses refers to clauses of the entire act, not merely to clauses of one section thereof, and when we come to consider a subsequent section of this act the rule will be brought into action again.

Section 223 presents no feature pertinent to this case.

Section 224 is ambiguous for, after providing for an appraisement when the execution creditor shall deem the homestead of greater value than \$1500, the appraisement to commence with the lot upon which the dwelling is located and appraising the same separately, the language is: "and if the same exceed \$1500, then the sheriff shall proceed to sell *all in excess of \$1500* by lots or smallest legal subdivisions, offering them in the order directed by the judgment debtor, if he chooses to direct; otherwise, he shall sell the same as aforesaid, so as to leave the homestead as compact as possible." In this section there is an apparent intention to limit the process of appraisement of the value of the homestead only to cases where the homestead claimed exceeds the minimum of one lot and when the execution creditor shall deem it worth more than \$1500, but the provision for sale by the sheriff after the appraisement has been made quite clearly directs a sale of all in excess of \$1500 which supports the provision in section 222 declaring that such homestead shall not exceed \$1500 in value. Thus far in the examination of the act is to be found contradictory provisions from which, without close analysis, it is difficult to determine whether the

legislature meant that the homestead claimant is entitled to the whole of one lot under any and all circumstances, or whether, in case of an appraisement which shows one lot to be worth more than \$1500 the sheriff could sell all in excess of \$1500 in value. It is significant, however, that the process of appraisement is to begin *with the twenty acres or lot upon which the dwelling is located appraising the same separately.* If, as will be claimed by the bankrupt, the debtor is entitled under this act to a homestead exemption of twenty acres or one city lot, regardless of value, what is the necessity of appraising the twenty acres or one city lot *separately?*

Why was this provision for a separate appraisement of the twenty acres or one lot inserted in the act? If the claimant is to have twenty acres or one lot in any event, why appraise it at all? Coupled with the clause which follows: "and if the same exceed fifteen hundred dollars, then the sheriff shall proceed to sell all in excess of fifteen hundred dollars by lots or smallest legal subdivisions" it appears to indicate an intention to set a maximum limit of value of the homestead regardless of its area.

It will also be noted that section 224 treats of appraisement by lots or parcels yet when it comes to speak of the sale that classification is abandoned and the basis of the right to sell is expressed in terms of *value* not *dimension.* Had the legislature intended to provide only for a sale of the excess in area over one lot the language would have been: "then the sheriff shall proceed to sell all in excess of *one lot* (or twenty acres as the case may be) by lots or smallest legal subdivisions," etc. There is a strong current of phraseology running

through sections 222 and 224 persuasive of an intent to put a limitation of value on the homestead as well as a limitation as to size.

But when due consideration is given to the succeeding section 225 the construction contended for by the trustee becomes more obviously the correct one. Bearing in mind that section 224 relates to distinct proceedings for a formal appraisalment and subsequent sale by the sheriff of all of the property claimed as exempt in excess of \$1500, section 225 provides a substitute procedure. It says: "*In lieu of the proceedings aforesaid, the execution creditor may at any time pay the execution debtor the sum of \$1500 and proceed to sell the homestead as he might heretofore have done, adding the said \$1500 to his lien, but the money aforesaid shall be exempt from execution.*"

Now if the legislature literally meant that in no event should the homestead be reduced to less than one lot this section serves no purpose. It is useless, for the preceding section provides an elaborate method of ascertaining value and dimensions when the execution creditor deems the property claimed by the debtor to be of greater value than \$1500. Unless the lawmakers intended to make some provision for reaching the excess in the value of a homestead that might be claimed in one lot it is impossible to give effect to section 225. If the debtor claims an exemption of more than one lot which the creditor deems worth more than \$1500, the appraisalment provided for in section 224 is for the purpose of setting aside the excess of \$1500 in value for sale on execution, but the legislature must have contemplated that there would be cases where the value of

a home on one lot would exceed \$1500 and not wanting to reduce the homestead in specie to less than one lot, and realizing the impracticability of doing so in many instances, they enacted section 225 to provide an alternative or substitute procedure to cover cases to which in the nature of things the process directed in section 224 could not apply. To prevent the law from being unworkable, as well as leading to inequitable, unreasonable and absurd consequences, the legislature enacted section 225 "*in lieu of the proceedings aforesaid*" whereby the execution creditor is given the right and power *at any time* to pay the debtor his \$1500 exemption in cash and have the homestead sold. The words "at any time" are significant. They were inserted for a purpose and obviously that purpose is to give the execution creditor the right of exercising his option of paying the debtor \$1500 in lieu of the homestead *at any time, i. e.*, whenever he deems it to his interest and convenience to do so, even after an appraisement as provided in the preceding section but before sale. In such case the creditor, of course, would be taking the chance of the property being worth less than the \$1500 thus paid. If the property sold for less he would be out the difference between the amount realized and the \$1500 paid to the homestead claimant, besides not realizing anything on the original amount of his execution. The debtor would then have no homestead in land but he would have the \$1500 in cash in lieu thereof with which to purchase another home. Section 225, therefore, contains another clear, and it seems to us decisive, declaration of an intention on the part of the legislature to limit the homestead exemption to \$1500 in value in any event.

By it \$1500 in money is made the standard, and thereby ambiguous provisions in preceding sections are harmonized.

On the argument in the court below it was claimed by counsel for the bankrupt that the word "heretofore" in the clause: "and proceed to sell the homestead as he might *heretofore* have done," refers to the provisions of section 224; that "heretofore" as used in section 225 relates no further back than to the preceding section; that section 224 is the only section in the law which provides for any proceedings and therefore (they argued) the right to sell the debtor's property by paying him \$1500 comes into existence only when the homestead claimed by the debtor exceeds the minimum of one lot. It was claimed that this interpretation is the only one that will harmonize all sections of the law. On the contrary, it would make "confusion worse confounded." In the first place, as above stated and as clearly appears from its language, section 225 provides a *substitute* for the appraisement and sale specified in section 224. It is not merely additional or supplementary to, nor an elaboration or extension of that proceeding; it is an alternative, complete in itself. By section 225 the execution creditor is given a clear choice of a course of action; he can have an appraisement made and sell the excess of \$1500 in value as provided in section 224, or *in lieu* of that course he can exercise a more direct and summary right by paying the \$1500 in cash. In the latter event he can have the homestead sold by the sheriff—not merely the excess of one lot nor the excess of \$1500, but the whole property. "As he might heretofore have done" undoubtedly refers to what he might have

~~been~~ done before the enactment of the law. Had the legislature meant that after paying the debtor \$1500 the creditor could proceed to sell only as prescribed in section 224, that is to say, all of the homestead in excess of \$1500 or all in excess of one lot, the language in section 225 would have been "as hereinbefore," or "as hereinabove" or "as in the preceding section of this act" provided.

The statutes of some of the states have declared the word "heretofore" when used in a statute to mean any time previous to the day when such statute shall take effect.

**Rev. Stat. Mo. 1899, Sec. 4155.**

**Civ. Code Mont. 1895 Sec. 4670.**

**Hurds Rev. Stat. Ill. 1901, p. 1720, c. 131, Sec. 1, Subd. 17.**

**Rev. Stat. Wis. 1898, Sec. 4971.**

**Code Iowa 1897, Sec. 54.**

**Laws N. Y. 1892, c. 677, Sec. 9.**

We find no statutory definition in the laws of Oregon, but the popular, usual and ordinary meaning of the word coincides with the foregoing. As a noun the word "heretofore" means time that is past. As an adverb it means: In previous times; previously; to the present time; hitherto.

**Standard Dictionary.**

Heretofore means in time past; in the time before the present; formerly; before this time; down to this time; hitherto. In statutes and constitutions the words "hereafter" and "heretofore" usually relate to the time when the enactment takes effect, and not to the time of its passage.

**15 Enc. Law 2d Ed. 336.**

**21 Cyc. 435.**

*Andrews v. Thayer*, **40 Conn. 156**.

*George v. People*, **167 Ill. 447**.

*People v. Baltimore R. Co.*, **117 N. Y. 150**.

A statute must be construed with reference to the time of the passage thereof, or with reference to its going into effect. That meaning must be given to words which they had at the date of the act, and descriptive matter therein must refer to things as they existed at the time of its passage. But words of time are usually to be construed as spoken when the act takes effect.

**26 Enc. Law 2d Ed. 565, 611, 612.**

*Gerding v. Beall*, **63 Ga. 562**.

*People v. Cook County*, **176 Ill. 584**.

*Evansville v. Barbee*, **59 Ind. 593**.

*Charles v. Lamberson*, **1 Iowa 435**.

*Bennett v. Bevard*, **6 Iowa 82**.

*Thatcher v. Haun*, **12 Iowa 303**.

*Fairchild v. Masonic Hall Assn.*, **71 Mo. 527**.

Matawan v. Horner, 48 N. J. L. 445.

State v. Holtcamp, 235 Mo. 322.

Counsel for the bankrupt will contend that the phrase "as he might heretofore have done" should be construed as if it read substantially, "as he might heretofore *as provided in the preceding section of this act* have done." They are necessarily forced to that contention, because if it be admitted that "heretofore" as used in section 225 has reference only to time previous to the day the statute took effect, and that the intent thereof is that the creditor may proceed to sell the homestead as he might have done *before the taking effect of the act* the conclusion must follow that the right given to the execution creditor of paying the homestead claimant \$1500 in cash in lieu of the home claimed by him wipes out the homestead in specie, and leaves the land claimed as such open to levy and sale as it was before the homestead law went into effect; because prior to that time, as hereinbefore stated, there was no exemption from execution sale of land provided in the laws of Oregon. Our position is that section 225 means just this, and that the use of the word "heretofore" so indicates. To give that word any other meaning is to import something in its definition not justified by any of the authorities above cited, and, moreover, would make the entire section practically meaningless, because it would leave the execution creditor just where section 224 left him, and the section would not furnish the procedure which in express terms it declares to be "in lieu of the proceedings" in section 224.

That section 225 is susceptible of no such construction as will be contended by the bankrupt is manifested not only by the use therein of the word "heretofore" but also by the use of the word "homestead."

In section 224 the sale authorized is of "all in excess of \$1500" or, as counsel may argue, all in excess of one lot; but in section 225 there is no such restriction on the sale. It provides that when at any time the execution creditor pays \$1500 he may sell "the homestead." Not merely a part of it, or an excess above a certain area or value, but *the homestead*. Now, this must necessarily mean the whole parcel, otherwise the sale would not be "*in lieu of*" the kind of sale mentioned in the preceding section which is a sale of the *excess*, and a sale of the excess would not be a sale of *the homestead*—it would leave a homestead trimmed down to a minimum but nevertheless a homestead. Moreover, if the right to sell the debtor's property on paying him \$1500 comes into existence only when the homestead claimed by the debtor exceeds the minimum in quantity, that is, one lot, why give the creditor any such option? What good would it do him to increase his demand \$1500 by paying out that sum in hard cash for the barren privilege of doing what the law gave him a right to do without that?

That section 225 was intended to provide an exemption of not to exceed \$1500 in lieu of the provisions for a specific exemption of not less than 20 acres or one lot is made yet more obvious by the last clause therein *which exempts from execution the \$1500 in cash that may have been paid by the creditor*. This clause removes every doubt as to whether the procedure under section 225 is intended as a complete substitute for the

proceedings mentioned in section 224. The legislature cannot have intended that the debtor should have both his homestead of one lot and \$1500 in cash paid by the execution creditor, yet if the construction contended for by the bankrupt in the court below be sustained that result will follow. No where in the act is there anything to indicate that the legislature intended to grant a homestead of not less than one lot *and \$1500 in addition thereto*. The limitation apparent all through its provisions is \$1500 in value. Provision is made for reserving a homestead in specific lands, and where it is set aside in specie it shall not be less than one lot; but at all times this provision is subject to the limitation as to value and hence section 225 unmistakably gives an alternative, exercisable by the execution creditor, of putting up \$1500 in cash which is to stand for and be in lieu of the specific homestead of one lot or twenty acres. The debtor canot retain the homestead in land, be it one lot or more, and the money paid in lieu thereof at the same time. The law transfers his exemption right from the land to the money. The land is thereby released and freed from the homestead claim and can be sold on the execution in the same manner it might have been sold before the homestead law went into effect.

This interpretation does no violence to any of the settled rules of statutory construction. The pole star, of course, is the intention of the legislature which must be gathered from the language of the act, and in view of the benevolent purpose of such laws they are to be liberally construed so as to give effect to them in accordance with their letter and spirit. This rule, however, does not authorize the court to go beyond the

spirit and intent of the statute. The construction adopted must be sensible and reasonable, and great care should be taken, while liberally construing homestead laws, to prevent them from becoming instruments of fraud.

15 Enc. Law 2d Ed. 533, 534.

Drucker v. Rosenstein, 19 Fla. 191.

Southwick v. Davis, 78 Cal. 504.

In a case involving the construction of the exemption laws of Washington, this court, speaking by *Ross, Circuit Judge*, said:

"While it is well-established law that exemptions in behalf of unfortunate debtors are to be liberally construed in furtherance of the object of such statutes, it should never be forgotten that courts have not the power to legislate, and can no more add an exemption not fairly within the statute than they can take from the statute. So also must it be remembered that courts of bankruptcy proceed upon equitable principles, and should no more sustain a positive fraud than would a court of equity."

In re Gerber, 186 Fed. 693, 698; 26 Am. B. R. 608, 613.

In line with this doctrine there is another to the effect that courts will adopt that construction most agreeable to reason and justice as embodying the in-

tention of the lawmakers, for it will not be presumed that the legislature contemplated unreason and injustice. Where, therefore, a literal interpretation leads to unreasonable or unjust consequences, and an intention to adopt a reasonable statute may fairly be inferred, the court will adopt a sensible construction such as will effectuate the legislative intention and avoid the objectionable consequences.

**26 Enc. Law 2d Ed. 646, 647, *Cases cited Notes 1 and 2.***

**Lau Ow Bew v. U. S., 144 U. S. 47; 36 L. Ed. 340, 344.**

**"Statutes and Statutory Construction:" Monograph, 1 Fed. Stat. Ann. pp. XLIX to LVII.**

So, also, there is a strong presumption against absurdity in a statute, and when the language of an act is susceptible of two senses, that sense will be adopted which will not lead to absurd consequences.

**26 Enc. Law 2d Ed. 648.**

**Holy Trinity Church v. U. S., 143 U. S. 457; 36 L. Ed. 226.**

**Tsoi Sim v. U. S., 116 Fed. 920.**

**U. S. v. Hogg, 112 Fed. 909.**

With these general canons of statutory construction in mind a comparison of the two interpretations of the Oregon homestead law contended for in this case will

show that the position of the trustee in this case presents more points of agreement with settled doctrines, and evolves a more just, reasonable, sensible statute, freer from harsh, inequitable and absurd consequences, than does the position of the bankrupt. Nor is this all. No doubt courts who are called upon to construe a statute could frequently write a better one. That is not the function to be exercised here; but in determining the meaning of a statute every part of it is to be given effect if possible. The whole act is to be construed together, and we claim for our interpretation that if it does not give literal effect to every clause in the law in question its application will certainly effectuate more of the provisions of the act than the construction urged by the bankrupt.

For example: the bankrupts position hinges almost exclusively on the last clause of section 222, which is to disregard the first clause in the same section, also the provision in section 224 directing a sale of all in excess of \$1500, and also practically the whole of section 225. If it be held that the debtor shall in any event and under all circumstances have an exemption of not less than one lot section 225 becomes inoperative and meaningless. If it be held that section 225 merely gives the creditor the right of selling the excess over one lot upon payment of \$1500, then the word "heretofore" in said section is given a distorted meaning, and the last clause: "but the money aforesaid (i. e. the \$1500 paid by the creditor) shall be exempt from execution" is either made inoperative or else in effect gives a double exemption—one lot *and* \$1500. Another example of absurd, unjust and inequitable consequences that would flow from such

a construction is that a debtor could retain a million dollar home as exempt provided it was constructed on one city lot. The owner of a steel sky-scraper in the heart of the city costing any amount, could by making it his actual abode relieve it of all danger of levy for his debts. Probably the legislature could enact a valid law giving such an exemption if it saw fit; the power to exempt \$1500 includes the power to exempt \$15,000 or \$1,500,000. Our point is that \$1500 in value, as such laws go, is a fair, just and reasonable homestead exemption; \$15,000 or \$1,500,000 is not, and there is a strong presumption that the legislature did not intend to pass a law from which such unreasonable consequences could flow. The law in question, taking it by the four corners, contains language and provisions which are obviously in harmony with the reasonable and sensible interpretation urged herein, and there is no clear, unqualified declaration of a contrary intention to be found in the act.

We do not overlook the last clause in section 222. It will be the dominant note in respondent's brief. But why overlook the first clause in the same section? The language of the penultimate clause of section 224? The whole of section 225?

In construing a statute every section, provision and clause should be expounded by reference to every other, and, if possible, every clause and provision be given and have the effect contemplated by the legislature. One portion of a statute should not be construed to annul or destroy what has been clearly granted by another. The most general and absolute terms of one section may be qualified and limited by conditions and exceptions

contained in another, so that all may stand together. If in a subsequent section of the same act provisions are introduced which show the sense in which the legislature employed doubtful phrases previously used, that sense is to be adopted in construing the phrases.

Peck v. Jenness, 7 How. 612; 12 L. Ed. 841.

Bernier v. Bernier, 147 U. S. 242; 37 L. Ed. 152.

Gayler v. Wilder, 10 How. 447; 13 L. Ed. 504.

Washington Market Co. v. Hoffman, 101 U. S. 112; 25 L. Ed. 782.

Brown v. Duchesne, 19 How. 183; 15 L. Ed. 595.

Alexander v. Alexandria, 5 Cranch 1, 7-8; 3 L. Ed. 19, 21.

If it be argued that there is an irreconcilable conflict between the first clause and the last clause of section 222, and that therefore the last in order of position must control, then by the same rule the last clause in section 222 must give way to or be controlled, limited and qualified by the provisions of section 225 which shows the sense in which the legislature employed the phrases in section 222 (*Alexander v. Alexandria supra*; 26 Am. & Eng. Enc. Law 2 Ed. 619; 36 Cyc. 1130; *In re Rhoads*, 98 Fed. 399, 401; *In re Richards*, 96 Fed. 935, 939).

With due regard to the language of the entire act giving each word its ordinary meaning and value, and giving to each section a meaning consistent with its terms, we submit that section 222, reduced to its lowest terms is a declaration of intention on the part of the leg-

islature to give every family a homestead exemption either in money or in land of the value of \$1500; that if the same is allotted in money the amount shall not exceed \$1500; that if the same is allotted or selected in land the area shall not be less than twenty acres nor one lot *provided that at any time the execution creditor may pay to the execution debtor the maximum cash exemption of \$1500 and sell the twenty acres or one lot as he could have done before the passage of the law.* The words "such homestead" in the last clause of section 222 must relate to the character of homestead mentioned in the clause immediately preceding, that is to say, the homestead *in specie*, the twenty acres or one lot. The words "regardless of value" must, under the settled rules of construction to which reference has been made, be controlled and limited by the first clause in section 222, and by sections 224 and 225. If not, then those three words nullify the first ten words of section 222, seven words in section 224, viz.: "all in excess of fifteen hundred dollars," and practically the whole of section 225, transform a just, reasonable and sensible law into a harsh statute pregnant with inequalities and absurdities, and an ever ready haven of refuge for fraudulent and dishonest debtors.

The learned trial judge apparently was not insensible of this result, for in his decision (Transcript of Record, p. 23) he says: "Now, the language of the homestead law is indefinite and uncertain, and quite difficult, if not impossible, to reconcile. I do not think it can be determined with any certainty until we have an adjudication by a court of last resort. \* \* \* Now, this is a harsh conclusion, but if it is the law, the courts

have no alternative but to enforce it. *In any event this is probably as good a case as will arise for the purpose of testing the question in an appellate court.*" In short, the ruling of the trial court is tantamount to a mere certificate of the question to this court, and was probably not intended as an authoritative precedent. Indeed, the language of the decision justifies the statement that it was pro forma in character, and the burden of reviewing was cast upon the trustee. The error in the conclusion reached therein consists in giving to the words "regardless of value" a literal interpretation as if they stood alone, unmodified, uncontrolled, unlimited and undefined either by any of the other provisions of the act or by its spirit, which is violative of the elementary rule that a statute ought not to be expounded by detached words and phrases but the whole act must be taken together and be given a fair interpretation, neither extending it nor restricting it beyond the legitimate import of its language and its obvious policy and object (*Gayler v. Wilder supra*; *Pollard v. Bailey*, 20 Wall. 520; 22 L. Ed. 376; *U. S. v. Boisdore*, 8 How. 113; 12 L. Ed. 1009).

Taking the statute as a whole it would be a hard strain on language to say that thereby the legislature evinced an intention of exempting from the just claims of creditors' property of debtors which might easily be, and in many instances is, worth thousands of dollars in excess of all claims against the debtor; or that the obvious policy and object of the act is to render it easily possible for a dishonest debtor to withdraw his investments from property accessible by execution and place his funds within the protection of the homestead law.

To construe the whole act of more than four hundred words by singling out three of those words, and distorting most of the other three hundred and ninety-seven to make them fit the arbitrary and solitary three, may be legislation but it is not judicial interpretation. Those three words must be construed with reference to coordinate words, phrases and provisions.

We respectfully submit that the order of the District Court should be reversed, and the order of the referee affirmed.

**BAUER & GREENE and  
A. H. McCURTAIN,**

Solicitors for R. L. Sabin, Trustee in Bankruptcy.

**THOMAS G. GREENE  
of Counsel.**



No. 2497

# In the United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of M. BARDE and J.  
LEVITT, individually and as partners  
as BARDE & LEVITT,  
Bankrupts.

## Respondent's Brief

GILTNER & SEWALL,

Attorneys for Respondent.

Filed

JAN 30 1915

F. D. Monckton,  
Clerk.



# In the United States Circuit Court of Appeals

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For the Ninth Circuit

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In the Matter of M. BARDE and J.  
LEVITT, individually and as partners  
as BARDE & LEVITT,  
Bankrupts.

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## Respondent's Brief

The appellant's brief contains a correct statement of the facts. The only question before the court is one of statutory construction.

### ARGUMENT

Four sections of the Oregon code must be considered in determining whether the dicision of the District Court was correct. We will take up each section by itself and demonstrate conclusively that these four sections are entirely harmonious, and are susceptible of only one possible construction.

We first turn to Section 222, L. O. L. This section in its first provision places a twofold limit upon the homestead. First of all, it cannot exceed 160 acres

in extent if situated in the country, or one block if situated in a city or town. In the second place, it shall not embrace as much as 160 acres or as much as one block, if such an amount of land, with the buildings, exceeds \$1500 in value. This is what the following language in that section means, to-wit:

“Such homestead shall not exceed \$1500 in value nor exceed 160 acres in extent, if not located in town or city laid off into lots and blocks; if located in any such town or city, then it shall not exceed one block.”

This portion of the section means that the right to so large an area as 160 acres or a block, as the case may be, is dependent upon the question of value; and if this large area, with the buildings, is worth more than \$1500, then the area shall be cut down. But to what extent shall this area be cut down because the value exceeds \$1500? The decisive answer is found in the final provision of this same section, which is unambiguous and so plain in its meaning that a child could not be excused for not understanding it. The language is:

“But in no instance shall such homestead be reduced to less than 20 acres or one lot, *regardless of value.*”

This section is the one which fixes the extent of the *substantive right* of the debtor to a homestead. This is an important matter to be borne in mind. The sections that follow prescribe the *remedy* for the enforcement and protection of this right, and cannot possibly be resorted to for the purpose of placing any limitation upon the substantive right thus conferred

upon the debtor in the most explicit and unmistakable manner.

The obvious meaning of this section is that the debtor shall have 160 acres, or a block in extent, and no more, although the value thereof is less than \$1500. This is the fundamental limitation of the right, without reference to value. But this area, if worth more than \$1500, is to be cut down until the value of \$1500 has been reached, provided that the cutting down of this area shall never reduce the property in extent to less than 20 acres or one lot, as the case may be. Under the plainest terms of the statute, this debtor is to have this area, *regardless of value*.

We now come to the sections which deal with the matter of *remedy* for the enforcement of the respective rights of the creditor and the debtor. These are Sections 224 and 225. Section 223 has no application to the question we are considering.

Whenever a right of homestead is claimed, two parties are interested in the determination of this right—the creditor and the debtor. The purpose of these two sections—224 and 225—is to provide the machinery for determining the respective rights of the creditor and debtor in the particular case. But the right so determined by this machinery is not any right fixed by these two sections dealing with the mere matter of procedure, but it is the right definitely and finally fixed by Section 222, in which alone can there be found any provisions determining the substantive right of the debtor, and of course, at the same time, necessarily determining the substantive right of the creditor, which is the right to take everything in payment of his claim, except the homestead, as defined and fixed by this Section 222.

What is the plain meaning of Section 224, and when does this section become operative? It becomes operative only after there has been a levy upon the homestead and a notice served on the officer that the debtor claims the premises as his homestead, describing the same. The next step is that the officer must notify the creditor of such claim. And then comes the significant provision which absolutely limits the power of the creditor to proceed further. He cannot take a single step toward the appraisement of this homestead to find out whether it exceeds \$1500 in value, unless it be the fact that the homestead as so claimed by the debtor *exceeds the minimum* specified in the statute, to-wit: exceeds 20 acres or a lot, as the case may be. The statute provides:

“And if such homestead shall *exceed the minimum* in this act, and he (the creditor) deem it of greater value than \$1500, then he may direct the sheriff to select three appraisers, etc.”

In other words, the legislature in Section 222 gives the debtor an absolute right to 20 acres or a lot, as the case may be, regardless of value. It then declares that when the homestead is levied upon, the debtor may claim it, describing the land he claims; thereupon the officer shall notify the creditor of such claim. If it appears that the property so claimed does not exceed 20 acres or a lot, as the case may be, the creditor has no power to proceed a step further, but he must acquiesce in the claim made by the debtor to the property as an exempt homestead. His power to proceed does not arise unless, as a matter of fact, the homestead so claimed actually exceeds the minimum specified in the act, to-wit: the minimum in extent, which is 20 acres or a lot, as the case may be. This language does not

mean the minimum in amount, for in the very next breath the statute deals with this feature in the following explicit language:

“And he deems it of greater value than \$1500.”

This means that if the land claimed exceeds the minimum in extent and the creditor is satisfied that it is worth more than \$1500, he may have the appraisement made. The obvious purpose of this provision is to give the creditor the machinery for enforcing the provision in Section 222; that the creditor shall not have more than 20 acres or a lot, if the value is in excess of \$1500. But this provision does not warrant the construction that if the minimum of 20 acres or the lot is in excess of \$1500, then there shall be an appraisement for the purpose of cutting down the area still more. The explicit condition on which the creditor can take proceedings to have the homestead appraised is that the claim is for an amount in excess of 20 acres or a lot.

The word “same” in the phrase “and if the same exceed \$1500” plainly relates to the whole homestead as claimed, and not to 20 acres or a lot of it. The meaning of the statute is that the appraisers appraise the entire property claimed to be embraced in the homestead, commencing, however, with the lot or 20 acres on which the dwelling is located. If they shall find that the 20 acres or the lot with the dwelling is worth \$1500, then the sheriff must, in selling any portion of the homestead, leave to the debtor the 20 acres or lot with the dwelling thereon, and in addition enough more to make up the full value of \$1500.

We now come to Section 225. This section is intended to provide the creditor with a remedy which

shall be the equivalent of, although different in form, from the remedy provided in Section 224. Its purpose is not to enlarge the remedy of the creditor, and above all things, not to enlarge the creditor's rights or cut down the rights given to the debtor by Section 222. The language is: "In lieu of the proceedings aforesaid." This language plainly relates to an *alternative* procedure and nothing else. It relates to only those cases where the debtor is claiming more than the minimum in extent. This section contains the following significant provision, to-wit:

"And proceed to sell the homestead as he might heretofore have done."

The word "heretofore" as used in this section does not refer to a previous time, but to a provision in a previous portion of the statute. The word "heretofore" may very properly be used to express the idea that at some previous place in the writing, whatever its nature may be, matter may be found to which the clause containing the word "heretofore" relates. It is often used in this sense in a contract.

This section—225—is applicable only when the homestead as claimed by the debtor exceeds in extent the minimum specified in the statute, to-wit: 20 acres or a lot. Section 224 provides, as before stated, that the debtor may notify the officer that he claims the property levied upon as a homestead, describing it. Thereupon it is the officer's duty to notify the creditor. The creditor, however, can do nothing whatever with the situation unless the homestead as described by the debtor exceeds in extent the minimum specified in the statute; that is to say, exceeds 20 acres or a lot. In case it does so exceed such minimum, then, and only then, is the creditor authorized to take certain pro-

ceedings for the purpose of appraising the property and selling part of it in a proper case. Therefore, when Section 225 declares that the creditor may "in lieu of the proceedings aforesaid" take the steps provided for in Section 225, it means merely that whenever the facts, as specified in Section 224, warrant the creditor in taking the steps specified in Section 224, such creditor may "in lieu of the proceedings aforesaid" take the steps provided for in Section 225. In other words, under both sections there is a specific limitation upon the power of the creditor to take the steps provided for in such sections; and that limitation is that the homestead, as claimed by the debtor, shall exceed in area the minimum of 20 acres or a lot. This construction harmonizes the three sections perfectly.

Section 222 gives the debtor the homestead absolutely, if it does not exceed the minimum in extent. Sections 224 and 225 prescribe the proceedings which the creditor may take; but only on the express condition that the land claimed by the creditor as a homestead *exceeds* in extent the *minimum* of 20 acres or one lot.

Section 224 doubtless has in view a situation like this. The homestead as claimed may embrace a house and three lots, with the house on one lot. Such house and lot may be worth less than \$1500. The debtor claims the entire property as a homestead. The homestead as claimed, therefore, exceeds the minimum. The appraisers will value first the house and the lot on which it stands. If they find this to be worth less than \$1500, then the debtor is entitled to more land. They then proceed with their appraisal; and it is the property in such a case which is in excess of \$1500 in value that can be sold. In such a case the debtor would have the one lot, because that is his absolute

right; and he would have the additional amount of land necessary to bring the whole up to \$1500 in value.

Section 225 would be probably applicable to a case like this. The dwelling is located on two lots; therefore the debtor is compelled from the very nature of the case to claim both of the lots in order to claim his dwelling. This claim he has no right to make as an absolute claim, although he could lawfully claim absolutely one of the lots if the house were situated on that lot alone. When a case like this arises, the only possible test which the law can prescribe is the test of value, for in such a case it is impossible to give the debtor the dwelling and a single lot.

Counsel build their entire argument upon the supposed contradiction between Sections 224 and 225 on the one hand and Section 222 on the other hand. They contend that the later sections are inconsistent with the explicit provision contained in Section 222, which they admit is perfectly clear and unambiguous, and which they concede gives the debtor the 20 acres or the lot, regardless of value. See pages 9 and 10 of their brief.

But they urge that this clear provision must give way to the provision found in Sections 224 and 225, and in this connection they invoke the rule of law that when there is a contradiction in the statute the later provision in the order of position must control. This is a proper enough rule when it is kept within its proper limitations. But upon principle and authority such a rule can never have any application unless the later provision in the order of position in the statute is *as clear and explicit* as the prior provision, with which it is claimed to be in conflict. In State v. Williams, 8 Ind. 191, it is said of this rule:

“It is only when the subsequent clause of a statute has the combined advantage

of *equal clearness* as well as position that it will control the former."

To same effect:

Gibbons v. Brittenum, 56 Miss. 232.

People v. McClave, 1 N. E. 235.

State v. Mulhern, 78 N. E. 407.

The court has nothing to do with the wisdom of this statute, but its sole duty is to ascertain its meaning, and when such meaning has been ascertained, to enforce the statute without regard to the question whether it is a wise or unwise piece of legislation.

The language of the court in Jacoby v. Parkland Distilling Co., 43 N. W. 52, is pertinent. In this case the court said:

"Neither can the question of the value of the premises or what proportion that value bears to the remaining property of the debtor, be at all important so long as the premises are in area within the limit of exemption fixed by law. Unfortunately, our statute fixes no limit as to the value upon a homestead exemption. It must be confessed that such a law may be greatly abused and permit great moral frauds; but this is a question for the legislature and not for the courts."

We note further that counsel begs the question when he undertakes to influence the court by saying that "if we look at Section 222 alone, then it is possible for a debtor to retain a million dollar home, provided it is constructed on one city lot." The legislature has the power to exempt one lot worth \$20,000, as well as a lot worth \$1500, provided it is used as a homestead for the family. I do not think this power can be

legally questioned; therefore, "value" is not in the case. On this point I invite the court's attention to the case of Gallagher v. Smiley, 44 N. W. 187 and 189 of opinion. In this case the homestead was appraised at \$200,000, but the Supreme Court of Nebraska refused to permit it to be sold or interfered with by the judgment creditors and said:

"While it is true that, in view of the great value of the property now in dispute, the application of sound moral and business principles by defendant would require the payment of the debts against it, yet, if he prefer to hold the property and allow the judgments to remain to accumulate interest and finally sweep the whole from his heirs or legatees, we know of no legal objection to his pursuing that course. The judgment of the District Court is affirmed."

The judgment in the District Court was, in effect, that the judgment creditors had no right to interfere with the homestead or to sell it under execution.

The order of the District Court should be affirmed.

Respectfully submitted,

GILTNER & SEWALL,  
Attorneys for Respondent.

NO. 2499

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

POWER AND IRRIGATION COMPANY OF  
CLEAR LAKE, a Corporation, Organized  
and Existing Under the Laws of the State of  
Arizona,

Plaintiff in Error,

vs.

BANK OF WOODLAND, a Corporation, STEPHENS AGRICULTURAL AND LIVE STOCK COMPANY, a Corporation, JOSEPH CRAIG, P. N. ASHLEY, J. L. STEPHENS, J. J. STEPHENS, L. D. STEPHENS and N. A. HAWKINS,

Defendants in Error.

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Transcript of Record.

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Upon Writ of Error to the United States District Court  
of the Northern District of California,  
Second Division.

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Filed

NOV 5 - 1914

F. D. Monckton,  
Clerk.



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

POWER AND IRRIGATION COMPANY OF  
CLEAR LAKE, a Corporation, Organized  
and Existing Under the Laws of the State of  
Arizona,

Plaintiff in Error,  
vs.

BANK OF WOODLAND, a Corporation, STEPHENS AGRICULTURAL AND LIVESTOCK COMPANY, a Corporation, JOSEPH CRAIG, P. N. ASHLEY, J. L. STEPHENS, J. J. STEPHENS, L. D. STEPHENS and N. A. HAWKINS,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court of the United States, for the  
Northern District of California.*

POWER AND IRRIGATION COMPANY OF  
CLEAR LAKE, a Corporation, Organized  
and Existing Under the Laws of the State of  
Arizona,

Plaintiff,

vs.

BANK OF WOODLAND, a Corporation, CAPAY  
DITCH COMPANY, a Corporation, STE-  
PHENS AGRICULTURAL AND LIVE  
STOCK COMPANY, a Corporation, JO-  
SEPH CRAIG, P. N. ASHLEY, J. L.  
STEPHENS, J. J. STEPHENS, L. D. STE-  
PHENS and N. A. HAWKINS,

Defendants.

**Complaint.**

The above-named plaintiff complains of the above-named defendants, and for cause of action, alleges:

**I.**

That the plaintiff now is and ever since the 9th day of April, 1913, has been a corporation, duly organized and existing under and by virtue of the laws of the State of Arizona.

**II.**

That the defendant, Bank of Woodland, now is, and at all the times hereinafter mentioned has been, a corporation duly organized and existing under and by virtue of the laws of the State of California.

**III.**

That the defendant, Capay Ditch Company, now is, and at all the times hereinafter mentioned has been, a corporation duly [1\*] organized and existing under and by virtue of the laws of the State of California.

**IV.**

That the defendant, Stephens Agricultural and Live Stock Company, now is, and at all the times hereinafter mentioned has been, a corporation duly organized and existing under and by virtue of the laws of the State of California.

**V.**

That the defendants, Joseph Craig, P. N. Ashley, J. L. Stephens, J. J. Stephens, L. D. Stephens and N. A. Hawkins, are each and all residents and citizens of the State of California.

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\*Page-number appearing at foot of page of original certified Record.

## VI.

That heretofore, to wit, on the 24th day of March, 1912, the said defendants became and were indebted to one E. P. Vandercook, in the sum of one hundred sixty-seven thousand four hundred twenty-nine and 30/100 (\$167,429.30) dollars, for money had and received by the said defendants, of and from the said Vandercook, to and for the use and benefit of the said Vandercook; that thereafter and while said defendants were so indebted to said Vandercook, the said Vandercook, for a valuable consideration, sold, assigned, transferred and set over the said indebtedness, claim and demand, to this plaintiff, and plaintiff is now the lawful owner and holder thereof. That defendants have not paid the said sum of money, nor any part or portion thereof, or any interest due thereon, and the whole amount thereof, together with legal interest from said 24th day of March, 1912, is now due and owing from defendants to this plaintiff.

## SECOND COUNT.

For another, further and separate cause of action,  
[2] plaintiff avers:

## I.

That the plaintiff now is and ever since the 9th day of April, 1913, has been a corporation, duly organized and existing under and by virtue of the laws of the State of Arizona.

## II.

That the defendant, Bank of Woodland, now is, and at all the times hereinafter mentioned has been, a corporation duly organized and existing under and

4        *Power & Irrigation Co. of Clear Lake*  
by virtue of the laws of the State of California.

III.

That the defendant, Capay Ditch Company, now is, and at all the times hereinafter mentioned has been, a corporation duly organized and existing under and by virtue of the laws of the State of California.

IV.

That the defendant, Stephens Agricultural and Live Stock Company, now is, and at all the times hereinafter mentioned has been, a corporation duly organized and existing under and by virtue of the laws of the State of California.

V.

That the defendants, Joseph Craig, P. N. Ashley, J. L. Stephens, J. J. Stephens, L. D. Stephens and N. A. Hawkins, are each and all residents and citizens of the State of California.

VI.

That heretofore, to wit, on or about the 24th day of March, 1912, the said defendants became and were indebted to one E. P. Vandercook, in the sum of one hundred and seventeen thousand one hundred twenty-seven and 79/100 (\$117,127.79) dollars, for money paid out and expended by the said Vandercook, at the [3] special instance and request of defendants, to and for the use and benefit of said defendants. That thereafter, and while said defendants were so indebted to said Vandercook, said Vandercook for a valuable consideration, sold, assigned, transferred and set over the said indebtedness, claim and demand to this plaintiff, and plaintiff is now the

lawful owner and holder thereof.

### VII.

That defendants have not paid the said sum of money, nor any part or portion thereof, or any interest thereon, and that the whole of said amount, together with interest is now due and owing from defendants to plaintiff.

### THIRD COUNT.

And for another, further and separate cause of action, plaintiff avers:

#### I.

That the plaintiff now is and ever since the 9th day of April, 1913, has been a corporation, duly organized and existing under and by virtue of the laws of the State of Arizona.

#### II.

That the defendant, Bank of Woodland, now is, and at all the times hereinafter mentioned has been, a corporation duly organized and existing under and by virtue of the laws of the State of California.

#### III.

That the defendant, Capay Ditch Company, now is, and at all the times hereinafter mentioned has been, a corporation duly organized and existing under and by virtue of the laws of the State of California.

#### IV.

That the defendant, Stephens Agricultural and Live Stock Company, now is, and at all the times hereinafter mentioned [4] has been, a corporation duly organized and existing under and by virtue

of the laws of the State of California.

V.

That the defendants, Joseph Craig, P. N. Ashley, J. L. Stephens, J. J. Stephens, L. D. Stephens and N. A. Hawkins, are each and all residents and citizens of the State of California.

VI.

That heretofore, to wit, on the 19th day of January, 1907, one E. P. Vandercook made and entered into an agreement in writing with the defendants, and each of them, wherein and whereby the said Vandercook agreed to buy, and the said defendants agreed to sell to the said Vandercook, nine thousand eight hundred and sixty (9,860) shares of the capital stock of the Yolo County Consolidated Water Company, a corporation, which said stock was then owned by the said defendants.

VII.

That the price which the said Vandercook agreed to pay, and which the said defendants agreed to receive, therefor, was and is the sum of forty-five (\$45.00) per share, payable in money, stocks and bonds, as follows:

The sum of ninety-one thousand two hundred fifty dollars (\$91,250.00) on said 9th day of January, 1907, and the balance in cash and bonds as follows: The sum of three and 33/100 (\$3.33) dollars per share, in gold coin, on the 15th day of January, 1908, the sum of three and 33/100 (\$3.33) dollars per share, in gold coin, on the 15th day of July, 1908, and the sum of three and 33/100 (\$3.33) dollars per share in gold coin, on the 15th day of January, 1909; and

the balance, amounting to two hundred and fifty-eight thousand seven hundred and fifty and no/100 (\$258,750.00) dollars, in the bonds of a certain corporation known as the Central California Power Company, a [5] California corporation.

That it was further agreed that all of the said nine thousand eight hundred and sixty (9,860) shares of the capital stock of the said Yolo County Consolidated Water Company should be properly endorsed and placed in escrow with the California Safe Deposit and Trust Company, a California Corporation, as escrow-holder, and that the same should remain with the said corporation and should be delivered to the said Vandercook according to the terms of the said agreement between the said Vandercook and the said defendants.

That it was further agreed between all of the said parties that the aforesaid bonds of the said Central California Power Company, in the aforesaid amount of two hundred fifty-eight thousand seven hundred and fifty (\$258,750.00) dollars should also be placed in escrow with the said California Safe Deposit and Trust Company as soon as the same should be issued, and that the same should remain with said company until all cash payments provided for in the said agreement between said Vandercook and said defendants should be fully made, and until the said bonds should have a market value of ninety per cent (90%) of their par value, and that thereupon the said California Safe Deposit and Trust Company should deliver the stock of the said Yolo County Consolidated Water Company to the said Vandercook

and the said bonds to the said defendants.

That it was further understood and agreed that any and all moneys which might be expended by the said Yolo County Consolidated Water Company prior to the delivery, by said escrow-holder, to the said Vandercook of the said stock so held in escrow, for permanent betterments or improvements, or for the acquisition of any additional property required for a water system and for the storage of water, should be repaid to said Yolo County Consolidated Water Company by the said Vandercook. [6]

That it was further agreed that the said Vandercook might pay out to persons from whom contracts or options were held by said Yolo County Consolidated Water Company the moneys due or which should become due upon said contracts or options, and that the said Vandercook would further have the right to procure extensions of the said options, or any of them, to such time as would fully protect, in every particular, the then existing rights of the said corporation.

That it was further agreed that all payments for extensions made by the said Vandercook should be made in the name of or for the use of the said Yolo County Consolidated Water Company.

It was further agreed by the said defendants with the said Vandercook that the shares of the capital stock of the said Yolo County Consolidated Water Company so placed in escrow and sold to the said Vandercook, should not be subject to any indebtedness of the said corporation, or to any lien or liability, and that the said Yolo County Consolidated

Water Company should not be indebted in any sum whatever when said stock should be finally delivered as therein provided for, save and except that a certain bonded indebtedness of the said corporation in the sum of two hundred twenty-five thousand dollars (\$225,000.00) then outstanding, together with interest thereon thereafter to become due, should remain a liability of said Yolo County Consolidated Water Company.

That it was further understood and agreed that should the said Vandercook fail to make any of the additional payments of principal or interest therein provided, at the time the same became due, or should he fail to perform his part of the agreement, that then said Vandercook should lose all rights to purchase said property, and all moneys paid thereon should be retained as a consideration for the execution of said agreement, [7] and that said Vandercook should have no right to recover any portion of said payments.

That it was further understood and agreed that the said Vandercook would pay interest on all of the outstanding bonds of the Yolo County Consolidated Water Company, as the same should thereafter become due, and that all deferred payments on the purchase price of said stock of the Yolo County Consolidated Water Company, so purchased by said Vandercook should bear interest at the rate of five per cent per annum, payable semi-annually, from the date of said agreement until paid.

That it was further provided in said agreement that all net income of the Yolo County Consolidated

Water Company, arising from irrigation or otherwise, should be applied on said interest.

### VIII.

That the said Vandercook, pursuant to said agreement of the 19th day of January, 1907, paid to the said defendants, the aforesaid sum of ninety-one thousand two hundred and fifty (\$91,250.00) dollars, fifty-one thousand two hundred and fifty (\$51,-250.00) of which said sum was paid in cash, and forty thousand (\$40,000.00) dollars of which said sum was paid and discharged by delivering to the said defendants five hundred and thirty-three (533) shares of the capital stock of the Central Counties Land Company, a corporation, and the sum of twenty-five (\$25.00) dollars in cash, which said stock and cash said defendants agreed to and did then and there take, purchase and receive from said Vandercook in lieu of, and as a substitute for cash, and the said Vandercook duly delivered to the said California Safe Deposit and Trust Company, as provided for in said agreement, the said bonds of the said Central California Power Company in the amount of two hundred fifty-eight thousand seven hundred and fifty (\$258,750.00) dollars, and the said [8] defendants duly deposited with said California Safe Deposit and Trust Company, pursuant to said agreement, the aforesaid nine thousand eight hundred and sixty (9,860) shares of the capital stock of the Yolo County Consolidated Water Company.

### IX.

That thereafter, and pursuant to said agreement, the said Vandercook, on the 29th day of March, 1907,

paid to the said defendants, on account of the interest due on bonds of the said Yolo County Consolidated Water Company, the sum of two thousand one hundred ninety-four and 37/100 (\$2,194.37) dollars.

#### X.

That thereafter, and pursuant to the said agreement, the said Vandercook, on the 22d day of July, 1907, paid to the said defendants the sum of eight thousand three hundred twenty and 75/100 (\$8,320.75) dollars, said amount being the amount of interest then due on purchase price of said stock, at the rate of five per cent per annum, pursuant to the said agreement between said Vandercook and the said defendants.

#### XI.

That thereafter, and on the 18th day of November, 1907, said Vandercook paid to the defendants the sum of nineteen thousand five hundred seventy and 75/100 (\$19,570.75) dollars, being all interest then due on bonds and on the purchase price of said stock and all interest to become due under said contract to and including April 1st, 1908.

#### XII.

That as was contemplated by said agreement, the said Yolo County Consolidated Water Company paid out and expended for the acquisition of additional property for a water system and for the storage of water the sum of eighty-six thousand sixty and 50/100 (\$86,060.50) dollars, such payments being made [9] at divers times, as follows:

On or about the 19th day of January, 1907, the sum of forty-eight thousand nine hundred fifty-five

and 25/100 dollars (\$48,955.25).

On or about the 31st day of January, 1907, the sum of three hundred twenty-five (\$325.00) dollars.

On or about the 31st day of January, 1907, the sum of three thousand one hundred thirty-two and 50/100 (\$3,132.50) dollars.

On or about the 31st day of January, 1907, the sum of thirty-three thousand three hundred and thirty (\$33,330.00) dollars.

On or about the 26th day of February, 1907, the sum of two hundred ninety-two and 75/100 (\$292.75) dollars.

On or about the 26th day of October, 1907, the sum of twenty-five (\$25.00) dollars.

That all of the said sums, together with interest due thereon, were, pursuant to the terms of the said agreement and at the special instance and request of the defendants, repaid to the said Yolo County Consolidated Water Company, by the said Vandercook, on the days and dates, and in the amounts hereinabove set forth.

### XIII.

That while said contract was in full force and effect, the said defendants, by an instrument in writing made, executed and delivered by them to the said Vandercook, extended the time of the said Vandercook, within which to make payment of all sums of principal and interest provided for in the said contract, and then remaining due and unpaid, together with interest due or to become due thereon, until and including the 24th day of March, 1912. [10]

## XIV.

That thereafter while the said agreement of January 19th, 1907, with the said Vandercook, was in full force and effect, the said defendants rescinded the said agreement and notified the said Vandercook, in writing, that they, the said defendants, did cancel, rescind and annul the same, and then and there declared the said agreement to be rescinded, and null and void, and of no force and effect, either at law or in equity, and said defendants then and there notified the said Vandercook that his rights and privileges under the said agreement had terminated and ended, and that they would not longer be bound by the said agreement, would not perform the obligations upon their part to be kept and performed, that they would not perform the acts, or any of the acts, to be performed by them thereunder, and the said defendants thereupon received from the said escrow-holder the possession of the aforesaid nine thousand eight hundred and sixty (9,860) shares of the capital stock of the Yolo County Consolidated Water Company, which had been deposited in escrow as aforesaid, and sold and transferred the same to persons other than said Vandercook and this plaintiff.

## XV.

That notwithstanding the aforesaid rescission of the said contract by the said defendants, said defendants have not restored, returned or repaid to the said Vandercook, or to this plaintiff, the aforesaid moneys, or any part or portion thereof, so paid to them pursuant to the said agreement, or so paid to the said Yolo County Consolidated Water Company,

at the special instance and request of defendants, as provided for in said agreement. Nor have they repaid to the said Vandercook, or to this plaintiff, the interest or any part or portion thereof, due to the said Vandercook upon any of the aforesaid moneys, at the time of, and in consequence of the said rescission of the [11] said contract.

### XVI.

That after the rescission, cancellation and annulment of the said contract as aforesaid, the said Vandercook, on the 21st day of April, 1913, sold, transferred, assigned and set over unto this plaintiff, all of his rights, claims and interests of every kind whatsoever, to recover of and from the said defendants, all of the aforesaid sums so paid by him as aforesaid to defendants, on account of said purchase price and interest, and all of the aforesaid sums of money so paid out, to and for their use and benefit, as aforesaid, under the aforesaid contract, and plaintiff has ever since been and now is the lawful owner and holder of the said claims.

### XVII.

That interest figured at the legal rate of seven per cent per annum upon the aforesaid several sums of money so paid by said Vandercook to the said defendants, for and on account of the purchase price, and interest on the purchase price of said stock, and interest on bonds, pursuant to the said contract, computed to the date of the said rescission, amounts to the sum of forty-six thousand ninety-three and 43/100 (\$46,093.43) dollars.

### XVIII.

That interest figured at the legal rate of seven per

cent per annum upon the aforesaid several sums of money so repaid by the said Vandercook to the said Yolo County Consolidated Water Company, at the special instance and request of defendants, pursuant to the terms of the said contract, computed to the date of the said rescission, amounts to the sum of thirty-one thousand sixty-seven and 29/100 (\$31,-067.29) dollars. [12]

### XIX.

That the defendants have not repaid or returned to the said Vandercook, or to this plaintiff, either the whole or any part or portion of the moneys so paid to and received by defendants, as aforesaid, or so paid out, as aforesaid at their special instance and request, and that the aggregate amount of the said payments, to wit: Two hundred eighty-four thousand five hundred fifty-seven and 09/100 (\$284,557.09) dollars, together with interest on said amount from the 24th day of March, 1912, are now due and owing from the said defendants to this plaintiff.

WHEREFORE, plaintiff prays judgment against the said defendants for the sum of two hundred eighty-four thousand five hundred fifty-seven and 09/100 (\$284,557.09) dollars, together with interest thereon from the 24th day of March, 1912, at the legal rate of seven per cent (7%) per annum, and for costs of suit.

CHARLES S. WHEELER and  
JOHN F. BOWIE,

Attorneys for Plaintiff.

HARDING & MONROE,  
Of Counsel. [13]

State of California,  
City and County of San Francisco,—ss.

H. S. Elliot, being first duly sworn, deposes and says:

That he is the President of Power and Irrigation Company of Clear Lake, plaintiff in the above-entitled action, and that he makes this affidavit in its behalf; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information and belief, and as to those matters, that he believes it to be true.

H. S. ELLIOT.

Subscribed and sworn to before me this 24th day of April, 1913.

[Seal] ALICE SPENCER,  
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Apr. 24, 1913. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [14]

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UNITED STATES OF AMERICA.

*District Court of the United States, Northern District of California, Second Division.*

POWER AND IRRIGATION COMPANY OF  
CLEAR LAKE, a Corporation, Organized  
and Existing Under the Laws of the State of  
Arizona,

Plaintiff,

vs.

BANK OF WOODLAND, a Corporation, CAPAY DITCH COMPANY, a Corporation, STEPHENS AGRICULTURAL AND LIVE STOCK COMPANY, a Corporation, JOSEPH CRAIG, P. N. ASHLEY, J. L. STEPHENS, J. J. STEPHENS, L. D. STEPHENS and N. A. HAWKINS,  
Defendants.

**Summons.**

Action brought in said District Court, and the Complaint filed in the office of the Clerk of said District Court, in the City and County of San Francisco.

The President of the United States of America, Greeting: To Bank of Woodland, a Corporation, Capay Ditch Company, a Corporation, Stephens Agricultural and Live Stock Company, a Corporation, Joseph Craig, P. N. Ashley, J. L. Stephens, J. J. Stephens, L. D. Stephens, and N. A. Hawkins, Defendants.

YOU ARE HEREBY DIRECTED TO APPEAR, and answer the Complaint in an action entitled as above, brought against you in the District Court of the United States, in and for the Northern District of California, Second Division, within ten days after the service on you of this Summons—if served within this county; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said plaintiff will take judgment for any money or damages demanded

in the Complaint, as arising upon contract, or it will apply to the Court for any other relief demanded in the Complaint.

WITNESS the Honorable WILLIAM C. VAN FLEET, Judge of said District Court, this 24th day of April, in the year of our Lord, one thousand nine hundred and thirteen and of our [15] independence the one hundred and thirty-seventh.

[Seal]

W. B. MALING,

Clerk.

By J. A. Schaertzer,

Deputy Clerk.

#### RETURN ON SERVICE OF WRIT.

United States of America,  
Northern District of California,—ss.

I hereby certify and return that I served the annexed summons on the therein named N. A. Hawkins, by handing to and leaving a true and attested copy thereof together with copy of complaint attached thereto, with N. A. Hawkins, personally, at Woodland, Cal., in said District, on the 29th day of April, A. D. 1913.

C. T. ELLIOTT,

U. S. Marshal.

By I. W. Grover,

Office Deputy.

#### RETURN ON SERVICE OF WRIT.

United States of America,  
Northern District of California,—ss.

I hereby certify and return that I served the annexed summons on the therein named L. D. Stephens,

by handing to and leaving a true and attested copy thereof, together with copy of complaint attached thereto, with L. D. Stephens, personally, at Woodland, Cal., in said District, on the 29th day of April, A. D. 1913.

C. T. ELLIOTT,  
U. S. Marshal.  
By I. W. Grover,  
Office Deputy. [16]

#### RETURN ON SERVICE OF WRIT.

United States of America,  
Northern District of California,—ss.

I hereby certify and return that I served the annexed Summons on the therein named J. L. Stephens, by handing to and leaving a true and attested copy thereof, together with copy of Complaint attached thereto, with J. L. Stephens, personally, at Woodland, Cal., in said District, on the 29th day of April, A. D. 1913.

C. T. ELLIOTT,  
U. S. Marshal.  
By I. W. Grover,  
Office Deputy.

#### RETURN ON SERVICE OF WRIT.

United States of America,  
Northern District of California,—ss.

I hereby certify and return that I served the annexed Summons on the therein named Bank of Woodland (a corporation), by handing to and leaving a true and attested copy thereof, together with copy of Complaint attached thereto, with J. S. Craig,

Cashier of the Bank of Woodland (a corporation), at Woodland, Cal., in said District, on the 29th day of April, A. D. 1913.

C. T. ELLIOTT,  
U. S. Marshal.  
By I. W. Grover,  
Office Deputy.

RETURN ON SERVICE OF WRIT.

United States of America,  
Northern District of California,—ss.

I hereby certify and return that I served the annexed Summons on the therein named Capay Ditch Company (a corporation), by handing to and leaving a true and attested copy thereof, together with copy of Complaint attached thereto, with Roy M. Pike, President of the Capay Ditch Company (a corporation), personally, at San Francisco, Cal., in said District, on the 1st day of May, A. D. 1913.

C. T. ELLIOTT,  
U. S. Marshal.  
By I. W. Grover,  
Office Deputy. [17]

RETURN ON SERVICE OF WRIT.

United States of America,  
Northern District of California,—ss.

I hereby certify and return that I served the annexed Summons on the therein named Stephens Agricultural and Live Stock Company (a corporation), by handing to and leaving a true and attested copy thereof, together with a copy of complaint attached thereto, with F. W. Stephens, Secretary of

the Stephens Agricultural and Live Stock Company (a corporation), personally, at Woodland, Cal., in said District, on the 29th day of April, A. D. 1913.

C. T. ELLIOTT,  
U. S. Marshal.  
By I. W. Grover,  
Office Deputy.

RETURN ON SERVICE OF WRIT.

United States of America,  
Northern District of California,—ss.

I hereby certify and return that I served the annexed Summons on the therein named Joseph Craig, by handing to and leaving a true and attested copy thereof, together with copy of Complaint attached thereto, with Joseph Craig, personally, at Woodland, Cal., in said District, on the 29th day of April, A. D. 1913.

C. T. ELLIOTT,  
U. S. Marshal.  
By I. W. Grover,  
Office Deputy.

RETURN ON SERVICE OF WRIT.

United States of America,  
Northern District of California,—ss.

I hereby certify and return that I served the annexed Summons on the therein named P. N. Ashley, by handing to and leaving a true and attested copy thereof, together with copy of Complaint attached thereto, with P. N. Ashley, personally, at Woodland,

22      *Power & Irrigation Co. of Clear Lake*  
Cal., in said District, on the 29th day of April, [18]  
A. D. 1913.

C. T. ELLIOTT,  
U. S. Marshal.  
By I. W. Grover,  
Office Deputy.

RETURN ON SERVICE OF WRIT.

United States of America,  
Northern District of California,—ss.

I hereby certify and return that I served the annexed Summons on the therein named J. J. Stephens, by handing to and leaving a true and attested copy thereof, together with copy of complaint attached thereto, with J. J. Stephens, personally, at Woodland, Cal., in said District, on the 29th day of April, A. D. 1913.

C. T. ELLIOTT,  
U. S. Marshal.  
By I. W. Grover,  
Office Deputy.

[Endorsed]: Filed May 7th, 1913. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [19]

*In the District Court of the United States, for the  
Northern District of California.*

No. 15,656.

POWER & IRRIGATION COMPANY OF  
CLEAR LAKE, a Corporation, Organized  
and Existing Under the Laws of the State of  
Arizona,

Plaintiff,

vs.

BANK OF WOODLAND, a Corporation, CAPAY  
DITCH COMPANY, a Corporation, STE-  
PHENS AGRICULTURAL & LIVE  
STOCK COMPANY, a Corporation, JO-  
SEPH CRAIG, P. N. ASHLEY, J. L. STE-  
PHENS, J. J. STEPHENS, L. D. STE-  
PHENS and N. A. HAWKINS,

Defendants.

**Joint and Several Demurrer of All Defendants.**

Now come the defendants in the above-entitled cause and file this, their joint and several demurrer to the complaint of plaintiff on file herein, and for grounds of demurrer allege:

**I.**

That the first count of said complaint does not state facts sufficient to constitute a cause of action against these defendants, or either or any of them.

**II.**

That this Honorable Court has no jurisdiction of the subject matter of the first count of said complaint, or of the persons of these defendants, or

either or any of them, in this:

That it appears from said first count of said complaint that the said plaintiff was organized as a corporation under the laws of a foreign State in order to confer jurisdiction upon this Honorable Court and to deprive the courts of the State of California of jurisdiction hereof.

### III.

That the first count of said complaint is ambiguous, in [20] this: That it cannot be ascertained therefrom at what time the assignment therein alleged was made.

### IV.

That the said first count of said complaint is unintelligible, for the reason that it is hereinabove alleged to be ambiguous.

### V.

That the said first count of said complaint is uncertain, for the reason that it is hereinabove alleged to be ambiguous.

### VI.

That the second count of said complaint does not state facts sufficient to constitute a cause of action against these defendants, or either or any of them.

### VII.

That this Honorable Court has no jurisdiction of the subject matter of the second count of said complaint, or of the persons of these defendants, or either or any of them, in this:

That it appears from the said second count of said complaint that the said plaintiff was organized as a corporation under the laws of a foreign State in

order to confer jurisdiction upon this Honorable Court and to deprive the courts of the State of California of jurisdiction hereof.

### VIII.

That the second count of said complaint is ambiguous, in this: That it cannot be ascertained therefrom at what time the assignment therein alleged was made.

### IX.

That the said second count of said complaint is unintelligible, for the reason that it is hereinabove alleged to be ambiguous.

### X.

That the said second count of said complaint is uncertain, [21] for the reason that it is hereinabove alleged to be ambiguous.

### XI.

That the third count of said complaint does not state facts sufficient to constitute a cause of action against these defendants, or either or any of them.

### XII.

That this Honorable Court has no jurisdiction of the subject matter of the third count of said complaint or of the persons of said defendants, or either or any of them, in this:

That it appears from said third count of said complaint that the said plaintiff was organized as a corporation under the laws of a foreign State in order to confer jurisdiction upon this Honorable Court and to deprive the courts of the State of California of jurisdiction hereof.

**XIII.**

That the third count of said complaint is ambiguous, in this: That it cannot be ascertained therefrom at what time the assignment therein alleged was made.

**XIV.**

That said third count of said complaint is unintelligible for the reason that it is hereinabove alleged to be ambiguous.

**XV.**

That the said third count of said complaint is uncertain for the reason that it is hereinabove alleged to be ambiguous.

WHEREFORE, these defendants pray to be hence dismissed with their costs.

A. E. SHAW,  
BERT SCHLESINGER,  
DENSON, COOLEY & DENSON,  
THEODORE A. BELL,  
MASTICK & PARTRIDGE,

Attorneys for Defendants.

I hereby certify that I am one of the attorneys [22] for the defendants herein, and in my opinion the foregoing demurrer is well taken in point of law and is not interposed for delay.

JOHN S. PARTRIDGE.

Receipt of a copy of the within joint and several

demurrer of all defendants, this 9th day of June, 1913, is hereby admitted.

CHARLES S. WHEELER and  
JOHN F. BOWIE,

Solicitors for Plaintiff.

HARDING & MONROE,  
Of Counsel.

[Endorsed]: Filed Jun. 9, 1913. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [23]

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At a stated term, to wit, the March term, A. D. 1914, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the court-room in the City and County of San Francisco, on Tuesday, the 10th day of March, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable MAURICE T. DOOLING, District Judge.

No. 15,656.

POWER & IRRIGATION CO. OF CLEAR LAKE

vs.

BANK OF WOODLAND et al.

**Order Sustaining Demurrer.**

Defendants' demurrer, heretofore heard and submitted, being now fully considered and the Court having filed its opinion thereon, it was ordered that said demurrer be and the same is hereby sustained.

[24]

*In the District Court of the United States, for the  
Northern District of California, Second Division.*

No. 15,656.

POWER AND IRRIGATION COMPANY OF  
CLEAR LAKE, a Corporation,

Plaintiff,

vs.

BANK OF WOODLAND, a Corporation, et al.,  
Defendants.

**Order for Judgment.**

This matter came on to be heard on the 24th day of January, 1914, upon the demurrer of the defendants to plaintiff's complaint upon the ground that the above-entitled court is without jurisdiction to hear and determine the said action; and thereupon the said demurrer was argued by counsel for the respective parties and submitted to the Court for its decision, and all and singular, the premises having been duly considered by the Court, and it appearing that the said Court is without jurisdiction to hear and determine the said action,—

**IT IS HEREBY ORDERED AND ADJUDGED**  
that the said action be and the same is hereby dismissed, and that said defendants recover their costs herein, taxed at the sum of \$6.40, and that judgment be entered herein accordingly.

M. T. DOOLING,  
Judge of Said Court.

[Endorsed]: Filed Mar. 24, 1914. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [25]

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*In the District Court of the United States, in and  
for the Northern District of California, Second  
Division.*

No. 15,656.

POWER AND IRRIGATION COMPANY OF  
CLEAR LAKE, a Corporation, Organized  
and Existing Under the Laws of the State of  
Arizona,

Plaintiff,

vs.

BANK OF WOODLAND, a Corporation, CAPAY  
DITCH COMPANY, a Corporation, STE-  
PHENS AGRICULTURAL AND LIVE  
STOCK COMPANY, a Corporation, JO-  
SEPH CRAIG, P. N. ASHLEY, J. L. STE-  
PHENS, J. J. STEPHENS, L. D. STE-  
PHENS, and N. A. HAWKINS,

Defendants.

**Judgment.**

In this cause the Court having ordered that a judgment of dismissal, for want of jurisdiction, be entered herein with costs to the defendants:

Now, therefore, by virtue of the law and by reason of the premises, it is ordered that plaintiff take nothing by this action and that defendants go hereof without day; and that said defendants do have and recover of and from said plaintiff their costs herein

30      *Power & Irrigation Co. of Clear Lake*  
expended taxed at \$6.40.

Judgment entered March 24, 1914.

WALTER B. MALING,  
Clerk. [26]

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*In the District Court of the United States for the  
Northern District of California.*

No. 15,656.

POWER AND IRRIGATION COMPANY OF  
CLEAR LAKE, a Corporation, Organized  
and Existing Under the Laws of the State of  
Arizona,

vs.

BANK OF WOODLAND, a Corporation, CAPAY  
DITCH COMPANY, a Corporation, STE-  
PHENS AGRICULTURAL AND LIVE  
STOCK COMPANY, a Corporation, JO-  
SEPH CRAIG, P. N. ASHLEY, J. L. STE-  
PHENS, J. J. STEPHENS, L. D. STE-  
PHENS and N. A. HAWKINS.

**Clerk's Certificate to Judgment-roll.**

I, W. B. Maling, Clerk of the District Court of the  
United States for the Northern District of Cali-  
fornia, do hereby certify that the foregoing papers  
hereto annexed constitute the Judgment-roll in the  
above-entitled action.

ATTEST my hand and the seal of said District  
Court, this 24th day of March, 1914.

[Seal]

WALTER B. MALING,  
Clerk.

By J. A. Schaertzer,  
Deputy Clerk.

[Endorsed]: Filed March 24th, 1914. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.  
[27]

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*In the District Court of the United States, in and  
for the Northern District of California,*

No. 15,656.

POWER AND IRRIGATION COMPANY OF  
CLEAR LAKE, a Corporation, Organized  
and Existing Under the Laws of the State of  
Arizona,

Plaintiff,

vs.

BANK OF WOODLAND, a Corporation, CAPAY  
DITCH COMPANY, a Corporation, STE-  
PHENS AGRICULTURAL AND LIVE  
STOCK COMPANY, a Corporation, JO-  
SEPH CRAIG, P. N. ASHLEY, J. L. STE-  
PHENS, J. J. STEPHENS, L. D. STE-  
PHENS, and N. A. HAWKINS,

Defendants.

**Opinion Sustaining Demurrer.**

CHARLES S. WHEELER and JOHN F.  
BOWIE, Attorneys for Plaintiff.

A. E. SHAW, BERT SCHLESINGER, DEN-  
SON, COOLEY & DENSON, THEO-  
DORE A. BELL and MASTICK &  
PARTRIDGE, Attorneys for Defendants.

Plaintiff is a corporation organized and existing under the laws of Arizona. The complaint contains

three counts. The first count avers that on March 24th, 1912, the defendants were indebted to one E. P. Vandercook in the sum of \$167,429.30 for money had and received by them of and from said Vandercook to and for his use and benefit, and that said Vandercook had assigned to plaintiff his said claim and demand against defendants, and that plaintiff is now the lawful owner and holder thereof.

The second count alleges that on March 24, 1912, the defendants became indebted to said Vandercook, at the special instance and request of defendants, and for their use and benefit, and that Vandercook had assigned his claim and demand against defendants to plaintiff who is now the lawful owner and holder thereof.

The third count recites that in January, 1907, the defendants entered into an agreement, in writing, with said Vandercook, whereby he agreed to buy and they agreed to sell 9,860 shares of the capital stock of the Yolo County [28] Consolidated Water Company at the agreed price of \$45.00 per share, payable as follows:

\$91,250.00 down, and \$3.33 a share to be paid on each of the following dates: January 15, 1908, July 15th, 1908, January 15th, 1909, and the remainder, amounting to \$258,750.00 in the bonds of a corporation known as the Central California Power Company.

That the said capital stock of the Yolo County Consolidated Water Company should be properly endorsed and placed in escrow, and there remain to be delivered to said Vandercook, in accordance with

said agreement; that the said bonds of said Central California Power Company should also be placed in escrow, there to remain until all the cash payments had been made and until such bonds should have a market value of ninety (90%) per cent of their par value, when said bonds were to be delivered to defendants, and the stock of the Yolo County Consolidated Water Company was to be delivered to said Vandercook.

Said agreement also provided that said Vandercook might pay out certain moneys for contracts or options held by said Yolo County Consolidated Water Company and for extensions thereof, and that such payments made by him should be in the name and for the use of said company. It was also agreed that if said Vandercook failed to make any of the payments at the time the same became due, or should fail to perform his part of the agreement, he should lose all rights to purchase said stock, and all moneys paid thereon should be retained as a consideration for the execution of said agreement.

That said Vandercook should have no right to recover any portion of said payments.

The complaint further avers that pursuant to said agreement, said Vandercook deposited in escrow the bonds of the [29] said Central California Power Company, and during the life of the agreement, paid to defendants or for them, in accordance therewith, various amounts, aggregating \$207,396.37; that after said payments had so been made and while said agreement was in full force and effect, the defendants rescinded the same, and notified Vandercook

thereof, in writing, declaring the same to be rescinded and null and void ; and further notified Vandercook that they would no longer be bound by said agreement nor perform any of the acts to be performed by them thereunder.

That thereupon the defendants received from the escrow-holder the said 9,860 shares of the stock of the Yolo County Consolidated Water Company and sold and transferred them to some person other than Vandercook or the plaintiff ; that notwithstanding these facts, no part of the moneys paid to or for defendants by said Vandercook has been repaid.

That after the rescission, cancellation, and annulment of the contract as aforesaid, the said Vandercook sold, transferred, assigned and set over to plaintiff all of his rights, claims, and interest of every kind whatever to recover of and from the said defendants all of the aforesaid sums ; and that plaintiff is now the lawful owner and holder of said claims, the total amount sued for here, including interest, being \$284,557.09.

The substance of the complaint is thus fully set out, because the jurisdiction of the Court is challenged by demurrer, on the ground that recovery is sought upon a chose in action, and that as plaintiff's assignor, being a citizen of this State, could not have maintained an action in this court, his assignee, the plaintiff, cannot do so, although a citizen of another State.

The question thus presented is, whether the facts alleged in the complaint bring the case within the following provisions of Section 24 of the Judicial

Code: "No District Court shall have cognizance of any suit \* \* \* to recover upon any [30] promissory note or other chose in action in favor of any assignee \* \* \* unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made."

This section is of comparatively recent enactment. The provisions of former sections being that no assignee could recover "the contents of a chose in action" where his assignor could not do so. The phrase "contents of a chose in action" has been before the courts many times for interpretation as applied to particular facts. Nowhere, however, in the adjudicated cases have I been able to find such definition "of a chose in action" as could be relied upon for application in the present case, unless it be in the following language of the Supreme Court in Bushnell vs. Kennedy, 76 U. S. 390: "That the indebtedness here was a chose in action, cannot be doubted, for under that comprehensive description are included all debts, and all claims for damages for breach of contract, or for torts connected with contracts." Much confusion arose in the earlier cases because of the use of the words "to recover the *contents* of a chose in action." These words have been omitted from the section of the Judiciary Act above quoted, and in their place we have the words "to recover upon a chose in action." That the claim here assigned is a chose in action, I have not the slightest doubt. It must be remembered that we are not dealing with the words "contents of a chose in action,"

which would imply a subsisting contract having the contents capable of recovery ; but even if we were, the facts set out show that plaintiff, is relying upon a contract pleaded by it and defendants' failure to carry it out. Defendants' defense, if they have any, must also be based upon the contract and upon the failure of plaintiff's assignor to carry it out. The averment that defendants rescinded the contract serves only to confuse the [31] present question ; for if we take the averments of the complaint together, we will see that all that is really pleaded is that defendants have attempted to rescind the contract, as no rescission can be accomplished under the circumstances shown here until the party rescinding "has restored to the other party everything of value received from him under the contract" (Civil Code of Cal., Section 1691), I am satisfied that plaintiff is suing upon a chose in action, and that as it's assignor could not maintain the action in this court, plaintiff cannot do so.

The demurrer will therefore be sustained.

March 10th, 1914.

M. T. DOOLING,  
Judge.

[Endorsed]: Filed Mar. 10, 1914. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [32]

*In the United States District Court, for the Northern  
District of California, Second Division.*

No. 15,656.

POWER AND IRRIGATION COMPANY OF  
CLEAR LAKE, a Corporation, Organized  
and Existing Under the Laws of the State of  
Arizona,

Plaintiff,

vs.

BANK OF WOODLAND, a Corporation, STE-  
PHENS AGRICULTURAL AND LIVE  
STOCK COMPANY, a Corporation, JO-  
SEPH CRAIG, P. N. ASHLEY, J. L. STE-  
PHENS, J. J. STEPHENS, L. D. STE-  
PHENS and N. A. HAWKINS,

Defendants.

**Petition for Writ of Error and Order Allowing Writ  
of Error.**

To the Honorable Court Above Named:

Now, comes Power and Irrigation Company of Clear Lake, a corporation, plaintiff in the above-entitled action, by Charles S. Wheeler and John F. Bowie its attorneys, and respectfully shows, that on the 24th day of March, 1914, the Court made and filed herein its order wherein and whereby the said Court found that it was without jurisdiction to hear and determine the above-entitled action, and wherein and whereby it was ordered and adjudged that the said action be dismissed, that said defendants recover their costs, and that judgment be entered herein ac-

cordingly; and upon said order so made and filed as aforesaid, a final judgment was entered on the said 24th day of March, 1914, against your petitioner, Power and Irrigation Company of Clear Lake, a corporation, the plaintiff above named. Your petitioner feels itself aggrieved by the said order and judgment entered thereon as aforesaid and herewith petitions the Court for an order allowing it to procure [33] a Writ of Error to the Circuit Court of Appeals of the United States for the Ninth Circuit, sitting at San Francisco, under the laws of the United States in such cases made and provided.

WHEREFORE, the premises considered, your petitioner prays that a Writ of Error do issue, that an appeal in its behalf to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, in said Circuit, for the correction of errors complained of and herewith assigned, be allowed and that an order be made fixing the amount of security to be given by the plaintiff in error, conditioned as the law directs.

CHARLES S. WHEELER and  
JOHN F. BOWIE,  
Attorneys for Petitioner in Error.

**Order Granting Writ of Error [and Fixing Amount of Bond].**

Writ of Error granted upon the foregoing petition upon the Petitioner filing a bond in the sum of Three Hundred (\$300.00) Dollars, to be conditioned as required by law.

Dated September 23, A. D. 1914.

M. T. DOOLING,  
Judge.

[Endorsed]: Filed Sept. 23d, 1914. Walter B.  
Maling, Clerk. [34]

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*In the United States District Court, for the North-  
ern District of California, Second Division.*

No. 15,656.

POWER AND IRRIGATION COMPANY OF  
CLEAR LAKE, a Corporation, Organized and  
Existing Under the Laws of the State of  
Arizona,

Plaintiff,

vs.

BANK OF WOODLAND, a Corporation,  
STEPHENS AGRICULTURAL AND LIVE  
STOCK COMPANY, a Corporation, JO-  
SEPH CRAIG, P. N. ASHLEY, J. L.  
STEPHENS, L. D. STEPHENS and N. A.  
HAWKINS,

Defendants.

**Assignment of Errors on Writ of Error.**

Now, comes the plaintiff in the above-entitled ac-  
tion by its attorneys, Charles S. Wheeler and John  
F. Bowie, and avers that the judgment entered in  
the above-entitled cause on the 24th day of March,  
1914, is erroneous and unjust to the plaintiff, and  
files with its petition for a writ of error the follow-  
ing Assignment of Errors, and specifies that the

judgment is erroneous in each and every of the following particulars, viz.:

1. The said Court had jurisdiction of this action and erred in sustaining the defendants' demurrer to plaintiff's complaint for want of jurisdiction.

2. The judgment is erroneous in this: That it appears that the same was ordered and given upon the ground that the said Court was without jurisdiction of the action; whereas, the said Court had jurisdiction of the action.

3. The said Court erred in its opinion and conclusion [35] that the plaintiff is suing upon a chose in action within the meaning of Section 24 of the Judicial Code; whereas, the plaintiff is in fact suing upon an obligation created by law.

4. The said Court erred in holding "that no rescission can be accomplished under the circumstances shown here," etc., forasmuch as the complaint shows that the said rescission was accomplished by consent of all the parties, and it was not, in this case, necessary in order to accomplish such rescission to restore everything of value received under the contract.

WHEREFORE, the plaintiff prays that the said judgment be reversed, and the District Court directed to overrule said demurrer, or that such other relief be awarded as the nature of the case demands.

CHARLES S. WHEELER and  
JOHN F. BOWIE,

Attorneys for Plaintiff.

[Endorsed]: Filed Sept. 23d, 1914. Walter B.  
Maling, Clerk. [36]

*In the United States District Court, for the Northern District of California, Second Division.*

No. 15,656.

POWER AND IRRIGATION COMPANY OF  
CLEAR LAKE, a Corporation, Organized and  
Existing Under the Laws of the State of  
Arizona,

Plaintiff,

vs.

BANK OF WOODLAND, a Corporation, STEPHENS AGRICULTURAL AND LIVE STOCK COMPANY, a Corporation, JOSEPH CRAIG, P. N. ASHLEY, J. L. STEPHENS, J. J. STEPHENS, L. D. STEPHENS, and N. A. HAWKINS,

Defendants.

**Bond on Appeal.**

KNOW ALL MEN BY THESE PRESENTS, that we, Power & Irrigation Company of Clear Lake, a corporation, as principal, and Pacific Coast Casualty Co., as surety, of the City and County of San Francisco, State of California, are held firmly bound unto Bank of Woodland, a corporation; Stephens Agricultural and Live Stock Company, a corporation, Joseph Craig, P. N. Ashley, J. L. Stephens, L. D. Stephens and N. A. Hawkins in the sum of \$300.00, lawful money of the United States, to be paid to them and their respective executors, administrators, and successors; to which payment, well and truly to be made, we bind ourselves and

each of us, jointly and severally, and each of our successors and assigns, by these presents.

Sealed with our seals and dated this 23d day of September, 1914.

WHEREAS, the above-named Power and Irrigation Company of Clear Lake has prosecuted a writ of error to the Circuit Court of Appeals of the United States to reverse the judgment of [37] the District Court for the Ninth District of California, in the above-entitled cause.

NOW, THEREFORE, the condition of this obligation is such that if the above-named Power and Irrigation Company of Clear Lake shall prosecute its said writ of error to effect and answer all costs if it fails to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

**POWER AND IRRIGATION COMPANY OF  
CLEAR LAKE.**

By H. S. ELLIOT,  
President.  
By R. H. BORLAND,  
Secretary.

[Seal Power and Irrigation Company.]

**PACIFIC COAST CASUALTY COMPANY,**  
By R. W. STEWART,  
Attorney in Fact.

[Seal Pacific Coast Casualty Company.]

Approved September 23d, 1914.

M. T. DOOLING,  
Judge.

[Endorsed]: Filed Sept. 23d, 1914. Walter B.  
Maling, Clerk. [38]

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*In the United States District Court, for the Northern District of California, Second Division.*

No. 15,656.

POWER AND IRRIGATION COMPANY OF  
CLEAR LAKE, a Corporation, Organized and  
Existing Under the Laws of the State of  
Arizona,

Plaintiff,

vs.

BANK OF WOODLAND, a Corporation;  
STEPHENS AGRICULTURAL AND LIVE  
STOCK COMPANY, a Corporation, JO-  
SEPH CRAIG, P. N. ASHLEY, J. L.  
STEPHENS, J. J. STEPHENS, L. D.  
STEPHENS and N. A. HAWKINS,

Defendants.

**Praecipe for Transcript on Writ of Error.**

To the Clerk of the Above-entitled Court:

Sir: Please make up, print, and issue in the above-entitled cause a certified transcript of the record, upon a writ of error allowed in this cause, to the Circuit Court of Appeals of the United States for the Ninth Circuit, sitting at San Francisco, California, the said transcript to include the following:  
Judgment-roll, consisting of,—

Complaint;

Summons, with return of service thereon;

Joint and Several Demurrers of All Defendants;

**44      *Power & Irrigation Co. of Clear Lake***

Minute Order Sustaining Demurrers;

Order for Judgment;

Judgment;

Clerk's Certificate to Judgment-roll.

Opinion of the Court (Dooling, J.).

Petition for Writ of Error, and Order endorsed thereon, Assignment of Errors.

Writ of Error.

Citation on Writ of Error. [39]

Bond on Appeal.

Praecipe for Transcript on Writ of Error.

You will please transmit to the Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California, the said record when prepared, together with the Original Citation on Appeal.

CHARLES S. WHEELER and  
JOHN F. BOWIE,

Attorneys for Plaintiff and Appellant.

Service and receipt of a copy of the within Prae-  
cipe this 23d day of September, 1914, is hereby  
admitted.

MASTICK & PARTRIDGE,

A. E. SHAW,

BERT SCHLESINGER,

DENSON, COOLEY & DENSON,

Attorneys for Defendants.

[Endorsed]: Filed Sep. 23, 1914. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [40]

*In the District Court of the United States, in and for  
the Northern District of California.*

No. 15,656.

POWER AND IRRIGATION COMPANY OF  
CLEAR LAKE, a Corporation, etc.,  
Plaintiff,

vs.

BANK OF WOODLAND, a Corporation, et al.,  
Defendants.

**Clerk's Certificate to Record on Writ of Error.**

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing forty (40) pages, numbered from 1 to 40, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for transcript of record, as the same remain on file and of record in the above-entitled cause, and that the same constitute the return to the writ of error hereto annexed.

I further certify that the cost of the foregoing return to writ of error is \$24.00; that said amount was paid by the attorneys for the plaintiff, and that the original writ of error and citation issued in said cause are hereby annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District

46      *Power & Irrigation Co. of Clear Lake*

Court this 21st day of October, A. D. 1914.

[Seal]

WALTER B. MALING,

Clerk.

By J. A. Schaertzer,

Deputy Clerk. [41]

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*In the District Court of the United States for the  
Northern District of California, Second Division.*

No. 15,656.

POWER AND IRRIGATION COMPANY OF  
CLEAR LAKE, a Corporation, Organized and  
Existing Under the Laws of the State of  
Arizona,

Plaintiff,

vs.

BANK OF WOODLAND, a Corporation,  
STEPHENS AGRICULTURAL AND LIVE  
STOCK COMPANY, a Corporation, JO-  
SEPH CRAIG, P. N. ASHLEY, J. L.  
STEPHENS, J. J. STEPHENS, L. D.  
STEPHENS, and N. A. HAWKINS,

Defendants.

**Writ of Error [Original].**

United States of America,—ss.

The President of the United States, to the Honorable  
Judge of the District Court of the United States,  
for the Northern District of California, Division  
Two, Greeting:

Because in the record and proceedings, as also in  
the rendition of the judgment of a plea which is in

the said District Court, before you, between Power and Irrigation Company of Clear Lake, a corporation, organized and existing under the laws of the State of Arizona, plaintiff in error, and Bank of Woodland, a corporation, Stephens Agricultural and Live Stock Company, a corporation, Joseph Craig, P. N. Ashley, J. L. Stephens, J. J. Stephens, L. D. Stephens, and N. A. Hawkins, defendants in error, a manifest error has happened to the damage of said Power and Irrigation Company of Clear Lake, a corporation, etc., plaintiff in error, as by said complaint appears, and we being willing that error, if any hath been, should be corrected, and full and speedy justice be done to the party aforesaid, in this behalf do command you if judgment be therein given, that under [42] your seal you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, together with this writ, so that you have the same, at the City and County of San Francisco, State of California, where said Court is sitting, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, and the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct the error what of right, and according to the law and customs of the United States, should be done.

WITNESS, the Honorable EDWARD D. WHITE,

Chief Justice of the United States, this 23d day of September, A. D. 1914.

[Seal]                    WALTER B. MALING,

Clerk of the District Court of the United States, for the Northern District of California.

By \_\_\_\_\_,

Deputy Clerk.

Allowed this 23 day of September, A. D. 1914.

M. T. DOOLING,

Judge. [43]

Service and receipt of a copy of the within Writ this 23d day of September, 1914, is hereby admitted.

MASTICK & PARTRIDGE,

A. E. SHAW,

BERT SCHLESINGER,

DENSON, COOLEY & DENSON,

Attorneys for Defendants.

[Endorsed]: No. 15,656. In the United States District Court for the Northern District of California. Power and Irrigation Company of Clear Lake, a Corporation, Plaintiff, vs. Bank of Woodland, a Corporation, et al., Defendants. Writ of Error. Filed Sept. 23, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

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**[Return to Writ of Error.]**

The answer of the Judges of the District Court of the United States, in and for the Northern District of California.

The record and all proceedings of the plaint whereof mention is within made, with all things

touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal]

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Clerk. [44]

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*In the United States Circuit Court of Appeals for  
the Ninth Judicial Circuit.*

POWER AND IRRIGATION COMPANY OF  
CLEAR LAKE, a Corporation, Organized and  
Existing Under the Laws of the State of  
Arizona,

Plaintiff and Appellant,

vs.

BANK OF WOODLAND, a Corporation, STEPHENS AGRICULTURAL AND LIVE STOCK COMPANY, a Corporation, JOSEPH CRAIG, P. N. ASHLEY, J. L. STEPHENS, J. J. STEPHENS, L. D. STEPHENS and N. A. HAWKINS,

Defendants and Appellees.

**Citation on Writ of Error [Original].**

United States of America,—ss.

The President of the United States, to Bank of Woodland, a Corporation, Stephens Agricultural and Live Stock Company, a Corporation, Joseph Craig, P. N. Ashley, J. L. Stephens, J.

J. Stephens, L. D. Stephens, and N. A. Hawkins,  
Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth *District*, to be holden at the City and County of San Francisco, in the State of California, on the 22 day of October, 1914, being within thirty days from the date hereof, pursuant to a Writ of Error filed in the clerk's office of the District Court of the United States, for the Northern District of California, wherein Power and Irrigation Company of Clear Lake, a corporation, organized and existing under the laws of the State of Arizona, is the plaintiff in error, and you and each of you are the defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the party in that behalf. [45]

WITNESS the Honorable M. T. DOOLING, United States District Judge for the Northern District of California, this 23 day of September, A. D. 1914.

M. T. DOOLING,  
United States District Judge. [46]

Service and receipt of a copy of the within Citation this 23d day of September, 1914, is hereby admitted.

MASTICK & PARTRIDGE,  
A. E. SHAW,  
BERT SCHLESINGER,  
DENSON, COOLEY, & DENSON,  
Attorneys for Defendants.

[Endorsed]: No. 15,656. In the United States Circuit Court of Appeals for the Ninth Circuit. Power and Irrigation Company of Clear Lake, a Corporation, Plaintiff, vs. Bank of Woodland, a Corporation et al., Defendants. Filed Sep. 23, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

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[Endorsed]: No. 2499. United States Circuit Court of Appeals for the Ninth Circuit. Power and Irrigation Company of Clear Lake, a Corporation, Organized and Existing Under the Laws of the State of Arizona, Plaintiff in Error, vs. Bank of Woodland, a Corporation, Stephens Agricultural and Live Stock Company, a Corporation, Joseph Craig, P. N. Ashley, J. L. Stephens, J. J. Stephens, L. D. Stephens and N. A. Hawkins, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

Filed October 21, 1914.

FRANK D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.



No. 2499.

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IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT.

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POWER AND IRRIGATION COMPANY OF CLEAR  
LAKE, a Corporation, organized and existing under the  
laws of the State of Arizona,

Plaintiff in Error,

vs.

BANK OF WOODLAND, a Corporation; STEPHENS  
AGRICULTURAL AND LIVESTOCK COMPANY, a  
Corporation; JOSEPH CRAIG, P. N. ASHLEY, J. L.  
STEPHENS, J. J. STEPHENS, L. D. STEPHENS and  
N. A. HAWKINS,

Defendants in Error.

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**BRIEF OF APPELLANT.**

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CHARLES S. WHEELER and  
JOHN F. BOWIE,

Attorneys for Plaintiff in Error.

HARDING & MONROE,  
Of Counsel.

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Filed this.....day of March, 1915.

F. D. MONCKTON, Clerk,

By....., Deputy Clerk.

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THE JAMES H. BARRY CO

Filed

MAR 2 - 1915

F. D. Monckton,



IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT.

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POWER AND IRRIGATION COMPANY OF  
CLEAR LAKE, a Corporation, organized  
and existing under the laws of the State  
of Arizona,

*Plaintiff in Error,*

vs.

BANK OF WOODLAND, a Corporation;  
STEPHENS AGRICULTURAL AND LIVE-  
STOCK COMPANY, a Corporation; JOSEPH  
CRAIG, P. N. ASHLEY, J. L. STEPHENS,  
J. J. STEPHENS, L. D. STEPHENS and  
N. A. HAWKINS,

No. 2499.

*Defendants in Error.*

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**BRIEF OF APPELLANT.**

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**STATEMENT OF FACTS.**

This is an appeal from a judgment dismissing plaintiff's complaint for alleged want of jurisdiction. The facts are as follows:

On January 19, 1907, defendants in error agreed in

writing to sell to one Vandercook nine thousand eight hundred and sixty (9,860) shares of stock of Yolo County Consolidated Water Company at forty-five (\$45.00) dollars per share. This agreement is set forth on pages 6 to 10, inclusive, of the Transcript. The stock was placed in escrow. On the same date Vandercook paid ninety-one thousand two hundred and fifty (\$91,250.00) dollars on account of the purchase price (Tr., p. 10). Later on he paid on account of interest and on the unpaid balance of the purchase price sums aggregating thirty thousand eighty-five and 87/100 (\$30,085.87) dollars (Tr., p. 11).

He also, in compliance with the agreement, paid out eighty-six thousand sixty and 50/100 (\$86,060.50) dollars in acquiring certain properties (pp. 11-12).

By an instrument in writing, the time for making payment of the balance called for by the agreement of purchase was extended to March 24, 1912 (Tr., p. 12).

While the contract was in full force and effect, the defendants notified Vandercook that they rescinded the contract and declared it to be null and void and of no force in law or in equity; also that they would not be bound by it or perform the acts or obligations which the agreement imposed on them. They also took back the stock from the escrow holder and sold it (Tr., p. 13).

Vandercook assigned to plaintiff in error his right to recover back the moneys paid by him on the pur-

chase price and also those paid out by him on account of the contract (Tr., p. 14).

The moneys have not been restored, and hence this suit.

#### THE JURISDICTIONAL OBJECTION AND THE QUESTION HERE.

It was objected in the Court below that plaintiff's suit is grounded on a chose in action, and that as plaintiff's assignor could not have sued in the Federal Courts, the statute (§ 24 of the Judicial Code) prohibits such suit by his assignee. That section is as follows:

"No District Court shall have cognizance of any suit . . . to recover upon any promissory note or other chose in action in favor of any assignee . . . unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made."

The requisite citizenship exists here and it is conceded by the Court below that but for the foregoing provision the jurisdiction would be complete.

Presently we shall show that the phrase "or other chose in action" appearing in the foregoing act has been construed by the courts to be confined to actions founded on contracts and is held not to include actions founded upon some breach of an obligation imposed by law.

And we shall make it clear that this suit is of the

latter class; that is to say, it is founded not upon a contract but upon an obligation imposed by law.

Before doing so, however, we desire respectfully to point out that:

**THE LEARNED JUDGE OF THE COURT BELOW  
FELL INTO TWO FUNDAMENTAL ERRORS.**

In his opinion dismissing the suit, the learned Judge says:

"The facts set out show that plaintiff is relying upon a contract pleaded by it and defendants' failure to carry it out. Defendants' defense, if they have any, must also be based upon the contract and upon the failure of plaintiff's assignor to carry it out. The averment that defendants rescinded the contract serves only to confuse the present question; for if we take the averments of the complaint together, we will see that all that is really pleaded is that defendants have attempted to rescind the contract, as no rescission can be accomplished under the circumstances shown here until the party rescinding 'has restored to the other party everything of value received from him under the contract.' (Civil Code of Cal., Section 1691.) I am satisfied that plaintiff is suing upon a chose in action, and that as its assignor could not maintain the action in this court, plaintiff cannot do so" (Tr., p. 36).

We respectfully insist that the language quoted embodies two errors:

First: The Court declares that plaintiff is relying on the contract pleaded by it.

On the contrary, plaintiff insists that that contract was abandoned and rescinded and is absolutely extinguished and that, as will be presently demonstrated

beyond doubt, the suit is not brought upon the contract at all.

Second: The Court takes the mistaken view that no rescission could here be accomplished until the defendants followed up their notice of rescission by restoring to the assignor of Plaintiff in Error everything of value received from him under the contract.

That this latter conclusion is contrary to express statute and the decided cases will now be readily demonstrated:

**(1) The Rescission Being by Consent, Restoration Was Not Essential to Effectuate It.**

A contract may, of course, be rescinded by mutual consent (Civil Code of California, § 1689).

The Code, moreover, expressly states that it is only "when (*the rescission is*) not effected by consent," that he who rescinds must restore what has been received under the contract before a rescission is accomplished (Civil Code, § 1691).

The consent need not be express:

"Generally, as a contract can be made only by the consent of all the contracting parties, it can be rescinded by the consent of all. But this consent need not be expressed as an agreement. *If either party, without right, claims to rescind the contract, the other need not object, and if he permit it to be rescinded, it will be done by mutual consent.*"

*Parsons on Contracts*, § 678, p. 832 (Ninth Ed.).

*"When defendant refused to perform the covenants of the contract on his part, and plaintiff, instead of asserting his*

*rights thereunder acquiesced in and assented to such repudiation and demanded the return of the money paid, such facts were sufficient to constitute a rescission of the contract by consent of the parties."*

*Carter v. Fox*, 11 Cal. App., 67.

The foregoing quotations and the following illustrate what will constitute consent to a rescission in cases like that at bar:

"The matter directly involved in this action is the right to recover money paid on a contract rescinded by the other party to it. . . . In other words, he *acquiesced in the rescission of the contract on the part of Parlin, and falls back upon his right resulting from such rescission to recover the money paid, laid out and expended while the contract subsisted.*"

*Heilig v. Parlin*, 134 Cal., 99, 101.

The acquiescence of the vendee in the rescission referred to in the foregoing quotation consisted solely in suffering a default judgment to be entered against him when the vendor sued to quiet title.

"From the time defendants refused to accept payment and execute a deed, . . . the plaintiff has considered the contract rescinded, and bases this action partly upon that ground, his complaint *stating facts from which a rescission is a necessary inference.*"

*Drew v. Pedlar*, 87 Cal., 443, 449.

"The parties may at any time before conveyance rescind the contract by consent, which consent may be express, or implied from the acquiescence of one party in the acts of the other."

*Maupin on Marketable Title to Real Estate*,  
p. 578.

**(2) Upon a Rescission by Consent the Law Imposes an Obligation to Restore What Has Been Received and This Obligation May be Enforced by Suit.**

"One who obtains a thing . . . by a consent afterwards rescinded . . . must restore it to the person from whom it was thus obtained. . . ."

*Civil Code of Cal., § 1712.*

**THIS SUIT IS NOT UPON A CONTRACT.**

It is perfectly well settled that if one of the parties to a valid contract fails or refuses to perform it, and without right notifies the other that he rescinds it and will not be bound by it, the latter may, at his election, treat the contract as abandoned and rescinded. If he does this the contract is brought to an end by mutual consent. It ceases to exist. It is in law rescinded. This means that it is extinguished (Civil Code, § 1688), and the amounts which have been paid on the contract may be recovered by suit.

The case at bar is such a suit. It is not brought upon the contract; *for that has been extinguished*. It is brought to enforce an obligation *imposed by law*.

The books are full of cases which illustrate the principle involved and we quote from them:

". . . Upon a breach by the vendor of the covenant to convey, what courses are open to the vendee? Obviously these: he may stand upon the contract and sue at law for damages for the breach. Here his recovery will be governed by Sec. 3306 of the Civil Code; or, still standing upon his contract, he may go into equity, seeking its specific performance; or he may sue at law to recover the amount that may have been agreed upon as stipulated

damages; or, finally, treating the vendor's breach as an abandonment, he may himself abandon it, when, the contract having thus come to an end, he may sue at law to recover what he has paid, in an action for money had and received; for, the contract being at an end, the vendor holds money of the vendee to which he has no right, and to repay which, therefore, the law implies his promise."

*Glock v. Howard, etc. Co.*, 123 Cal., 1, 10.

" . . . It may be stated that both parties rely upon a line of decisions which *Cleary v. Folger*, 84 Cal., 316, 18 Am. St. Rep., 187, 24 Pac., 280, and *Drew v. Pedlar*, 87 Cal., 443, . . . are typical. In the first of these cases the contract of purchase and sale had been brought to an end by the default of both parties; in the second, a mutual rescission of a similar contract was implied from the acts and admissions of the parties. In each was presented the case of a naked rescission without any agreement between the parties as to the terms, in consequence of which it remained for the law to supply, and the courts to enforce, equitable terms of restoration and compensation, and it was held to be equitable that the purchaser, notwithstanding his default, should recover the amount of his partial payments less the damage suffered by the vendor by reason of the vendee's breach of contract. This has been the rule of decision in a number of similar cases since decided."

*Law Credit Co. v. Tibbitts*, 160 Cal., 626, 629.

As already pointed out a contract is *extinguished* by rescission (Civil Code, § 1688) and any suit brought to recover part payments made thereunder while it was in force cannot, in the nature of things, be brought on the contract. The foregoing quotations sufficiently emphasize this fact, but the language in the following excerpts says in so many words that the action

does not arise under the contract, and so we quote them:

"Plaintiff bases his claim upon the rule laid down in *Cleary v. Folger*, 84 Cal., 316; *Drew v. Pedlar*, 87 Cal., 443, and *Phelps v. Brown*, 95 Cal., 572. So far as applicable to the facts of this case the rule laid down in those authorities is simply that *when the parties to a contract have abandoned it, or it has been rescinded by mutual consent*, either party may recover money paid under it.

". . . The action is based upon the theory that by abandonment or rescission the contract of sale became non-existent, and therefore moneys which had been paid before its cancellation may be recovered as money paid for the use of the person who paid it. **This action is not, therefore, an action arising under the contract of sale.**"

*Joyce v. Shafer*, 97 Cal., 335, 337.

"**This is not an action arising under the contract**, but an action for money had and received (See *Joyce v. Shafter*, 97 Cal., 335)."

*Shively v. Semi-Tropic L. & W. Co.*, 99 Cal., 259.

"Treating the vendor's breach as an abandonment he (the vendee) may himself abandon it, when, the contract having thus come to an end, he may sue at law to recover what he has paid, in any action for money had and received; **for the contract being at an end, the vendor holds money of the vendee to which he has no right.**"

*Glock v. Howard, etc. Co.*, 123 Cal., 1, 10.

PLAINTIFF IS NOT THE ASSIGNEE OF A CHOSE IN ACTION WITHIN THE MEANING OF THE TERM AS USED IN THE JUDICIAL CODE.

Up to this point we have, we think, made it clear that the conclusions of the learned Judge below were grounded on an incorrect view of the nature of this action and of the law of rescission. His premises were false. But it yet remains to be pointed out that the plaintiff's action is not brought to recover on a chose in action and that the ruling cannot be sustained on any premises that actually exist.

That the claim of plaintiff in error in the case at bar would fall within some of the general definitions of the phrase "*chose in action*" to be found in the books must be conceded. But that phrase as employed in the Judicial Code, has been held to be used in a restricted sense. The phrase was used in the Judiciary Act of 1789 and also in the acts of 1887-8. There, as now, it speaks of "any promissory note or *other* chose in action." The Courts, doubtless under the rule of interpretation *noscitur a sociis*, have in suits by assignees confined the "other" choses in action spoken of in the statute *to claims arising on contract alone*, and have refused to take jurisdiction of such claims, but have not hesitated to take jurisdiction of rights of action based on some obligation imposed not by *contract*, but by the *law*.

## THE JUDICIAL CODE HAS NOT FURTHER RESTRICTED THE JURISDICTION.

The cases upon which we must rely have been decided under the earlier acts, since the question has not before arisen under the Judicial Code.

The phrase used in the earlier acts prohibited the Federal Courts from taking jurisdiction in any “suit to recover *the contents* of any promissory note or other chose in action in favor of an assignee,” etc.

This language was criticised a number of times by the courts, as “not happily chosen.”

*Commonwealth S. S. Co. v. American etc. Co.*,  
 197 Fed., 785;  
*Shoecraft v. Bloxham*, 124 U. S., 730, 735;  
*Plant Inv. Co. v. Jacksonville, etc. Ry.*, 152  
 U. S., 71, 76;  
*Corbin v. County of Blackhawk*, 105 U. S., 659.

And when the present Judicial Code was adopted in 1911 the words “the contents of” in the statute of 1887-8 were changed to the word “upon,” so that it now reads “suit to recover *upon* any promissory note or other chose in action.”

This change, however, did not alter the meaning of the paragraph, for the Judicial Code itself provides:

“Sec. 294. The provisions of this Act, so far as they are substantially the same as existing statutes, shall be construed as continuations thereof, and not as new enactments, and

there shall be no implication of a change of intent by reason of a change of words in such statute, unless such change of intent shall be clearly manifest."

The change in the wording of the statute was obviously made to meet the judicial criticism of the verbiage previously employed. Hence, the decisions under the earlier statute defining what constitutes a chose in action are directly in point.

#### JURISDICTION NOT OUSTED UNLESS ACTION IS BASED ON AN EXISTING CONTRACT.

The following quotations will make it clear that the choses in action which the Federal Courts must not take jurisdiction of in favor of an assignee, are those brought to enforce rights created by contracts—where the plaintiff *stands upon the contract* and seeks a specific performance of it, or damages for its breach:

*"In Ambler v. Eppinger, 137 U. S., 480 . . . it is held that the phrase 'chose in action' cannot be construed to include rights of action founded on some wrongful act or some neglect of duty, causing damage, but must be limited to suits founded upon contracts containing within themselves some promise or duty to be performed. In Deshler v. Dodge, 16 How., 622, and Bushnell v. Kennedy, 9 Wall., 387, the same construction was given to the similar phrase found in the eleventh section of the act of 1789; so that it is thus clearly decided by the Supreme Court that the limitation found in the act of 1888, and already cited, cannot be made applicable to claims in the nature of those declared on in the present action, which are for damages resulting from the alleged violation of the duty imposed upon the railway company to charge only legal rates for the transportation of property over its line of railway."*

*Conn v. Chicago, B. & Q. R. R. Co., 48 Fed.,*

*Simons v. Ypsilanti Paper Co.*, 33 Fed., 193, is a further recognition of this distinction:

"From this summary of decided cases it is quite evident that when the action is founded upon an express promise between the original parties it cannot be prosecuted by the assignee of the original promisee, unless the action would have lain by the assignor; but that the statute does not apply to actions of replevin to recover specific chattels, and perhaps also to actions upon implied promises which involve the breach of a legal duty, and which also might be brought in tort as well as in contract."

It will be noted that while a possible doubt is suggested in the foregoing language, nevertheless *Conn v. Chicago, B. & Q. R. R. Co.*, *supra*, is a later case, and does in fact hold that the statute does not apply to actions based upon a breach of legal duty.

The following cases emphasize the point that the choses in action referred to in § 24 of the Judicial Code, must be confined to those brought for the establishment of some right under an actual existing contract.

*Corbin v. County of Blackhawk*, 105 U. S., 659;  
*Shoecraft v. Bloxham*, 124 U. S., 735;  
*Plant Inv. Co. v. Jacksonville, etc. Ry.*, 152 U. S., 71;  
*Deshler v. Dodge*, 16 How., 631;  
*Bushnell v. Kennedy*, 9 Wall., 482;  
*Buckingham v. Dake*, 112 Fed., 260.

Now, as is said in *Ambler v. Eppinger*, 137 U. S., 480, the phrase "chose in action" must be limited to

suits founded upon *contracts*, and cannot be construed to include "rights of action founded on some wrongful act or some neglect of duty."

We have already pointed out that this suit is not brought upon a contract. It is founded on the wrongful act of defendants in withholding, after the contract had been rescinded and extinguished, the money they had received under it. It is because they have failed to perform a legal duty—an obligation imposed upon them by law—that this action is brought. It is not brought because they have failed to comply with a contract.

The distinction between an action for breach of contract and an action such as that at bar is obvious. If a party stands on the contract and sues for breach thereof, or for liquidated damages for its violation or to enforce it specifically, his action is based on contract. The contract as an existing thing is the foundation of the right in all such cases. The mere breach of a contract does not put an end to it, and damages for the breach arise therefore from the contract. *An action such as the case at bar, on the contrary, is based upon the fact that there is no contract.*

In a similar case the Supreme Court of California has said:

"From the time the defendants elected to rescind the contract, or to consider and treat it as rescinded, *it was their duty to refund the money they had received under the contract.*"

*Drew v. Pedlar*, 87 Cal., 443, 452.

The duty thus referred to is created by express law. It is one of the obligations laid down in the Civil Code and there denominated an “obligation imposed by law” (Civil Code, § 1712).

“The contract was at an end and the Nortons were left with plaintiff’s money in their hands . . . They could not retain the five hundred dollars as liquidated damages, and therefore *it became their duty to pay it back.*”

*Phelps v. Brown*, 95 Cal., 572, 576.

“The contract being at an end, *the vendor holds money of the vendee to which he has no right*, and to repay which therefore the law implies his promise.”

*Glock v. Howard*, 123 Cal., 1, 10.

The fact that the law is thus said to “imply a promise” on the part of the vendor to repay the money to which he has no right, does not mean that any contract to repay the same actually exists. The promise is a pure fiction to permit a convenient remedy in assumpsit for the tortious withholding:

“The circumstance that a cause of action in point of fact not *ex contractu* is allowed to be sued on in assumpsit and to be described as matter of contract and to be loosely spoken of as implied contract is of no more force to fix its actual character contrary to the truth than is the allegation of loss and finding in trover to convey the sense of a literal loss and finding. Permission to apply the action to a transaction not involving any real contract relation between the parties cannot change the true nature of the transaction and transform it into matter of contract. Courts cannot make contracts for parties. And the fictions and intendments per-

mitted for the sake of the remedy are explainable whenever necessary."

*Woods v. Ayres*, 39 Mich., 345, 349; 33 Am. Rep., 396.

The words of the Massachusetts Supreme Court in *Milford v. Commonwealth*, 144 Mass., 64, are also pertinent in this connection:

"A contract is sometimes said to be implied when there is no intention to create a contract, and no agreement of parties, *but the law has imposed an obligation which is enforced as if it were an obligation arising ex contractu. In such a case there is not a contract, and the obligation arises ex lege.*"

The fact that assumpsit will lie on such a claim is, therefore, of no consequence. *Conn v. Chicago, B. & Q. R. R. Co.*, *supra*, seems to have been such an action.

Another comparatively recent case (1906) which emphasizes our contention is *Muller v. Chicago, etc., Ry. Co.*, 149 Fed., 943. The objection to the jurisdiction was the same made in the case at bar. The facts as well as the conclusions of the Court are shown in the following excerpt:

"It was the legal duty of the Chicago Great Western Railway Company as a common carrier to accept the goods for carriage, and thereupon there attached to it the liability imposed by law upon a common carrier. The complaint does not show that there was any contractual modification of this liability, nor is there any allegation of any express or specific contract between the shipper and the carrier. The complaint states that the defendant 'then and there accepted the same as common carrier, and undertook

and agreed as such common carrier . . . to carry to Chicago . . . and there deliver to the Chicago, Indianapolis & Louisville Railway Company.'

"The gravamen of the action is the breach of duty imposed by law upon the carrier to carry safely; and the nature of the action is not necessarily changed by the allegation that the defendants agreed to perform the duty that the law imposed upon them. Such an agreement is implied, but is not the foundation of the carrier's duty nor the source of his liability, unless it is evident that the pleader intended to base his right to recover solely upon an express stipulation between the shipper and the carrier."

So also, we submit, it is here of no consequence that the defendants became possessed of the moneys of plaintiff's assignor under a contract. That contract has been extinguished. Upon its extinguishment, they were left with a legal duty to perform. Their failure to perform it is a breach of a duty imposed by law. It is as much of a tortious withholding as if they had found a bag of money and refused to give it over to the owner.

The duty to restore after a rescission what one has received under the extinguished contract, is among the obligations imposed expressly by law. Thus, under the heading "Obligations Imposed by Law," which introduces Part III of the Civil Code, is found § 1712 which, as we have already seen, declares that "One who obtains a thing by a consent afterwards rescinded must restore it":

"In general, it may be said that whenever the law creates a right, the violation of such right will be a *tort*, and where-

*ever the law creates a duty, the breach of such a duty coupled with consequent damage, will be a tort also. This applies not only to the common law, but also to such rights and duties as may be created by statute; Cooley, Torts, 650.*"

*Bouvier's Law Dictionary* (Rawle's Revision),  
Vol. 2, p. 1125.

"That actions on contracts and actions on tort cannot be united is elementary. *The one is based upon the violation of the contract made by the parties thereto. The other is based upon the violation of duties and obligations determined not from the form or contents of any contract, but from the policy of the law.* . . . The one upon the violation of an express contract made by the parties themselves is called an action *ex contractu* . . . The other form of action, based upon violations of the implied contract declared by law, is called an action *ex delicto*, or in tort."

*Nelson v. Great Nor. Ry. Co.*, 72 Pac., 642.

We have in the case at bar a duty cast by express law upon the defendants in error to restore all that our assignor paid them under the extinguished contract. This duty is imposed by the mandate of the law itself. It is a tortious act to withhold this money. Defendants have no right to it. Its detention savors of a conversion. The case is for all essential purposes on all-fours with *Conn v. Chicago, etc., supra*, wherein the Court says that the phrase "chose in action" will not include a claim for "damages resulting from the alleged violation of the duty imposed upon the railway company to charge only legal rates." In the

latter case just as in the case at bar the law implied a promise and permitted a suit in assumpsit.

"Charges made by a railway company, in excess of the regular rate for the carriage of passengers or goods, may be recovered back in an action for money had and received, railway companies being under the statutory obligations to charge all persons equally, and after the same rate under the same circumstances."

*Leake on Contracts* (5th Ed.), page 62.

### CONCLUSION.

In the foregoing pages we have endeavored to show that the suit at bar is not brought to recover on a "chase in action" as that phrase is to be understood in the 24th section of the Judicial Code; that said section is confined exclusively to suits based on contracts in fact; that this suit is not brought upon a contract at all, but is brought because of the violation of an obligation imposed by law; that such violation is tortious and is a breach of an obligation imposed, not by contract, but by law.

We also have shown, we think, that the learned Court below came to the conclusion that it did, owing to a misconception both as to the nature of the action, and also as to the steps necessary to accomplish a rescission of a contract by mutual consent.

For these reasons we ask that the judgment be reversed.

Respectfully submitted.

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Of Counsel.

No. 2499

IN THE

United States Circuit Court of Appeals  
For the Ninth Circuit

---

POWER AND IRRIGATION COMPANY OF CLEAR  
LAKE (a corporation), organized and  
existing under the laws of the State  
of Arizona,

*Plaintiff in Error,*

vs.

BANK OF WOODLAND (a corporation),  
STEPHENS AGRICULTURAL AND LIVE-  
STOCK COMPANY (a corporation), JOSEPH  
CRAIG, P. N. ASHLEY, J. L. STEPHENS,  
J. J. STEPHENS, L. D. STEPHENS and  
N. A. HAWKINS,

*Defendants in Error.*

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BRIEF FOR DEFENDANTS IN ERROR.

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Filed this.....day of March, 1915,

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.



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*Defendants in Error.*

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**BRIEF FOR DEFENDANTS IN ERROR.**

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**Statement of Facts.**

The facts may be very briefly stated. In 1907 defendants in error agreed in writing to sell to one Vandercook certain shares in the Yolo County Con-

solidated Water Company. Vandercook made part payment of the purchase price and in 1912 defendants in error refused to proceed with the contract, in fact repudiated it.

This was the situation in 1913. On April 9, 1913, the Power & Irrigation Company of Clear Lake, plaintiff in error, was organized as *an Arizona corporation*. Both Vandercook and defendants in error were citizens and residents of *California*. Vandercook *then assigned to plaintiff in error his right to recover back the moneys paid by him on the purchase price*.

The lower Court dismissed the action on the ground that plaintiffs' suit was grounded on a chose in action and that as plaintiffs' assignor could not have sued in the Federal Courts, the statute (Section 24 of the Judicial Code) prohibits such suit by his assignee.

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### Argument on the Law.

#### I.

##### THE MEANING AND APPLICATION OF SECTION 24 OF THE JUDICIAL CODE OF 1912.

That section is as follows:

"No District Court shall have cognizance of any suit \* \* \* to recover upon any promissory note or other chose in action in favor of any assignee \* \* \* unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made."

This section is a substantial re-enactment of the Judiciary Act of 1789 and the later acts of 1887-8, embodied for some years prior to 1912 in section 629 of the Revised Statutes. Section 629 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 508) provided in substance that no Circuit or District Court shall “have cognizance of any suit \* \* \* to recover the contents of any \* \* \* chose in action in favor of any assignee or of any subsequent holder \* \* \* unless such suit might have been prosecuted in such court to recover the said *contents* if no assignment or transfer has been made.”

Now the terms “the contents of any promissory note or other chose in action” have been construed to embrace *the rights the instrument conferred which were capable of enforcement by suit*. They were not happily chosen to convey this meaning, but they have received this construction.

*Schoecraft v. Bloxham*, 124 U. S. 730; 31 L. Ed. 574;

*Plant Investment Co. v. Keywest R. R.*, 152 U. S. 76; 38 L. Ed. 358.

When the Judicial Code of 1912 was enacted, the words “the contents of” in the Statute of 1887-8 were changed to the word “upon”, so that it now reads “suit to recover upon any promissory note or other chose in action”. This change in the wording throws the statute open to a wider and more liberal interpretation than it has heretofore received and clearly embraces the action in the case at bar.

## III.

**AN ACTION FOR RESTITUTION, AS ONE OF THE ALTERNATIVE  
REMEDIES FOR BREACH OF CONTRACT, IS AN ACTION TO  
RECOVER UPON A CHOSE IN ACTION WITHIN SECTION 24  
OF THE JUDICIAL CODE.**

The burden of the argument of plaintiff in error in its effort to support the jurisdiction of the lower Court may be thus stated—the plaintiff is not standing on his contract and seeking specific performance, or damages for its breach. The contract is extinguished because the parties have rescinded it. Upon its extinguishment, defendants are left with a legal duty to perform. Their failure to perform it is a breach of a duty imposed by law. In short, the action is brought upon *an obligation imposed by operation of law*, not upon a *contract*.

At the very outset we must point out that plaintiff in error loses sight of a very fundamental distinction, that is, the difference between a suit to recover upon a *contract* and a suit to recover upon a *chose in action* arising out of contract.

A chose in action is thus aptly defined by the Supreme Court in *Bushnell v. Kennedy*, 76 U. S. 390:

“That the indebtedness here was a chose in action cannot be doubted, for under that comprehensive description are included all debts, and all claims for damages for breach of contract, *or for torts connected with contracts*.”

If we adopt this language, then despite the contention of plaintiff in error, the action in the case at bar is one upon a chose in action within the

meaning of the statute. Plaintiff in error maintains that defendants in error are guilty of a *tortious act* in withholding the money, that defendants have no right to it and that its detention savors of a conversion (appellant's brief, p. 18). But under the very language in *Bushnell v. Kennedy, supra*, a suit to recover upon a chose in action may be one to recover "for torts connected with contracts".

To reiterate the contention of defendants in error, it is this:

The defendants in error maintain that this action is but an action for restitution, as an alternative remedy for repudiation or breach of contract; and that just as an action for *compensation* for breach of contract is a chose in action within the meaning of the statute, so also is an action for *restitution* to recover part payments under a contract which has been rescinded.

In support of its contention that the present action arises solely out of an obligation imposed by law, and that such a chose in action is not within the meaning of the statute, the plaintiff in error cites *Conn. et al. v. Chicago etc. R. R.*, 48 Fed. 177 (appellant's brief, p. 12). This was an action to recover overcharges in freight and is clearly distinguishable from the action in the case at bar on the ground that such an action sounds in tort and not in contract; in short is *ex delicto*, not *ex contractu*. It is well established that the "chose in action" meant by the statute is a chose in action arising out of contract and not out of tort.

In *Simons v. Ypsilanti Paper Company*, 33 Fed. 193, the Court recognizes the distinction very clearly in the following discussion of decided cases:

"The court takes an obvious and clear distinction between *rights of action founded upon contracts*, which contracts contain within themselves some promise or duty to be performed, and mere naked rights of action founded upon some wrongful act, some neglect or breach of duty to which the law attaches damages. 'A suit', said Judge Shipman, 'to compel the performance of a promise or duty by securing to plaintiff *that which is withheld by the defendant* is a suit to recover the contents of a chose in action', but a mere right of action to recover damages imposed by law for a delinquency is not within the prohibition of the statute and the objection to the jurisdiction fails."

This same distinction is recognized in *Utah-Nevada Co. v. De Lamar*, 133 Fed. 113; and in *Mexican National Ry. Co. v. Davidson*, 157 U. S. 201.

In short, the common law imposed the duty on common carriers to charge a reasonable compensation and an action to recover an overcharge on excess beyond reasonable compensation sounds in tort and not in contract.

*Graham v. C. M. & St. P. Ry. Co.*, 10 N. W. 609.

Hence, the case of *Conn. et al. v. Chicago, etc. Ry. Co.* falls among such cases as *Ambler v. Eppinger*, 137 U. S. 480, an action to recover damages for trespass in entering upon lands and cutting trees;

*Deshler v. Dodge*, 16 How. 622, an action to replevin for a quantity of bank bills; *Barney v. Globe Bank*, 5 Blatchf. 107, a suit against a bank to recover for neglecting to protest drafts, and many others.

That the Court rested its decision in *Conn. et al. v. Chicago, etc. Ry. Co., supra*, on the above cases is clear from its language at page 178:

“The limitation thus enacted in regard to suits upon assigned causes of action, is expressly confined to those brought to recover the contents of a promissory note or other chose in action—and cannot be made applicable to claims of the nature of *those declared upon in the present action*, which are for damages resulting from the alleged violation of the duty imposed on the railway company to charge only legal rates for transportation of property.”

In the case of *Glock v. Howard and Wilson Colony Company*, 123 Cal. 1, Judge Henshaw (at page 10) states the remedies of a vendee on a breach by the vendor of a covenant to convey as follows:

“Now, in such contracts, upon a breach by the vendor of the covenant to convey, what courses are open to the vendee? Obviously these: He may stand upon the contract and sue at law for damages for the breach. Here his recovery will be governed by section 3306 of the Civil Code; or, still standing upon his contract, he may go into equity, seeking its specific performance; or, he may sue at law to recover the amount that may have been agreed upon as stipulated damages; or, finally, treating the vendor's breach as an abandonment, he may himself abandon it, when, the contract having

thus come to an end, he may sue at law to recover what he has paid, in an action for money had and received; for, the contract being at an end, the vendor holds money of the vendee to which he has no right, and to repay which, therefore, the law implies his promise."

Taking these remedies in turn, it is clear that actions in pursuit thereof are actions to recover upon a chose in action within the meaning of the statute:

1. Taking the first remedy, that of an action at law for damages for the breach of a contract, the following cases support the proposition that suit cannot be maintained by an assignee thereof unless it could have been maintained by the assignor.

*Simons v. Ypsilanti Paper Co.*, 33 Fed. 193, an action to recover damages for a refusal to accept and pay for merchandise purchased under an oral contract;

*Republic Iron Min. Co. v. Jones*, 37 Fed. 721, an action for a breach of contract of lease;

*Jackson v. Pearson*, 60 Fed. 113; and

*Mexican Nat. R. R. Co. v. Davidson*, 157 U. S. 201.

2. Taking the second remedy, that of specific performance, in equity, the following cases support the proposition that an assignee of the right to maintain an action therefor cannot maintain the action unless it could have been maintained by his assignor.

*Boston Safety etc. Co. v. Plattsburgh*, 76 Fed. 881;

a mortgagee holding by assignment a contract made between two corporations of the same state cannot sue for specific performance.

*Corbin v. Black Hawk Co.*, 105 U. S. 659, an action to compel the specific performance of a contract to convey land.

*Shoencraft v. Bloxham*, 124 U. S. 730; and  
*Plant Investment Co. v. Jacksonville etc. R. Co.*, 152 U. S. 71.

3. An action by an assignee to recover liquidated damages and an action to recover restitution seem never to have arisen under the statute in question, but the defendants respectfully submit that they should be treated as actions "to recover upon a chose in action" within the meaning of the statute. In the case at bar the plaintiff has elected to pursue the remedy of recovering the part payments which it made under the contract, and which the defendants, in equity and good conscience, should restore; rather than sue for compensation in damages for breach of defendants' contract to transfer the stock. The situation is simply this: Upon the repudiation of the contract by the defendants, the plaintiff has elected to *disregard* its contract; that is, to quit performance on his side, refuse to accept further performance by the other party, and relinquish its right to compensatory damages measured by reference to the terms of the contract, and demand resti-

tution of the payments he has made under the contract. This right of restitution would therefore seem to be an alternative remedial right arising from the violation of the contract and in pursuit of such remedial right the plaintiff is suing "to recover upon a chose in action" within the meaning of the statute, equally as though he had elected to sue for damages for its breach. As said by Mr. Justice Grier in the early case of *Sheldon v. Hill*, 8 How. 441:

"The term 'chose in action' is one of comprehensive import. It includes the infinite variety of contracts, covenants and promises which confer on one party a right to recover a personal chattel or a sum of money from another, by action."

The mischief which the statute was aimed to prevent was the colorable and collusive assignment, sale or transfer of the subject matter of a suit made for the mere purpose of conferring jurisdiction of the Federal Courts, and it is apparent that the very evil which this statute was aimed to prevent will arise unless this demurrer is sustained.

### III.

**CONCEDING, FOR THE SAKE OF ARGUMENT, THAT THIS ACTION IS NOT A SUIT UPON THE KIND OF A CHOSE IN ACTION REFERRED TO IN THE STATUTE, BECAUSE THE ACTION IS UPON OBLIGATION CREATED BY LAW; SO, ALSO, IS AN ACTION UPON A JUDGMENT, AND THE LATTER IS CLEARLY WITHIN THE STATUTE.**

The plaintiff in error maintains that after the rescission of the contract the contract was at an end.

The suit is not brought on that contract. It is now as if that contract had never existed, but the law, by express mandate, laid upon the defendants the obligation to restore to Vandercook the consideration and that this obligation is not one arising from contract, but is one arising from a duty imposed by law.

Now, the language of the plaintiff in its brief is equally applicable and, in fact, even stronger in case of an action brought upon a judgment. Once a judgment has been obtained in an action on a contract, the cause of action is merged in the judgment, and "it is as if the contract never existed".

Yet the authorities are uniformly to the effect that the assignee of a judgment founded on a contract cannot maintain a suit thereon in a Federal Court unless such suit might have been prosecuted there, had no assignment been made.

*Walker v. Powers*, 104 U. S. 245;

*Metcalf v. Watertown*, 125 U. S. 586;

*Mississippi Mills v. Cohn*, 150 U. S. 202.

In conclusion we submit that this action for restitution of money paid under a contract which has been rescinded is but the adoption of one of the four alternative remedies for breach of contract and is therefore controlled by section 24 of the Judicial Code. It is nothing more nor less than an action "to recover upon a chose in action" arising out of contract and accordingly, since plaintiff's assignor could not maintain it, plaintiff cannot.

We therefore ask that the judgment of the District Court dismissing the complaint be affirmed.

Dated, San Francisco,  
March 10, 1915.

S. C. DENSON,  
JOHN S. PARTRIDGE,  
ALAN C. VAN FLEET,  
*Attorneys for Defendants in Error.*

No. 2500

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

POWER AND IRRIGATION COMPANY OF  
CLEAR LAKE, a Corporation,

Appellant,

vs.

CAPAY DITCH COMPANY, a Corporation,  
YOLO COUNTY CONSOLIDATED  
WATER COMPANY, a Corporation, YOLO  
WATER AND POWER COMPANY, a Cor-  
poration, J. M. ADAMSON, L. D. STE-  
PHENS and JOSEPH CRAIG,

Appellees.

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Transcript of Record.

---

Upon Appeal from the United States District Court  
for the Northern District of California,

Second Division.

~~Fitted~~

NOV 5 - 1914

F. D. Monckton,  
Clerk.



**No. 2500**

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**United States  
Circuit Court of Appeals  
For the Ninth Circuit.**

---

**POWER AND IRRIGATION COMPANY OF  
CLEAR LAKE, a Corporation,**

**Appellant,**

**vs.**

**CAPAY DITCH COMPANY, a Corporation,  
YOLO COUNTY CONSOLIDATED  
WATER COMPANY, a Corporation, YOLO  
WATER AND POWER COMPANY, a Cor-  
poration, J. M. ADAMSON, L. D. STE-  
PHENS and JOSEPH CRAIG,**

**Appellees.**

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**Transcript of Record.**

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**Upon Appeal from the United States District Court  
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Second Division.**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the United States District Court for the Northern  
District of California.*

POWER AND IRRIGATION COMPANY OF  
CLEAR LAKE, a Corporation,

Plaintiff,

vs.

CAPAY DITCH COMPANY, a Corporation,  
YOLO COUNTY CONSOLIDATED  
WATER COMPANY, a Corporation, YOLO  
WATER AND POWER COMPANY, a Cor-  
poration, J. M. ADAMSON, L. D. STE-  
PHENS, and JOSEPH CRAIG,

Defendants.

**Bill to Redeem.**

The above-named plaintiff complains of the defendants above named, and for cause of action alleges:

I.

That the plaintiff now is, and ever since the ninth day of April, 1913, has been, a corporation duly organized and existing under and by virtue of the laws of the State of Arizona.

II.

That the defendant Capay Ditch Company now is, and at all the times hereinafter set forth has been, a corporation duly organized and existing under and by virtue of the laws of the State of California.

III.

That the defendant Yolo County Consolidated Water Company now is, and at all the times herein-  
after mentioned has been, a corporation duly organ-

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ized and existing under and by virtue of the laws of the State of California.

IV.

That the defendant Yolo Water and Power Company now is, and at all times since December 11, 1911, has been, a corporation duly organized and existing under and by virtue of the laws of the State of California.

V.

That the defendants J. M. Adamson, L. D. Stephens, and [1\*] Joseph Craig are each and all residents and citizens of the State of California.

VI.

That on the 18th day of November, 1907, Central Counties Land Company, a corporation, duly organized and then existing under and by virtue of the laws of the State of California, was the owner, and in possession, and was entitled to the possession of all those certain lots, pieces or parcels of land situate, lying and being in the County of Lake, State of California, described as follows:

Lots two (2), three (3), and four (4), section six (6), township twelve (12) north, range six (6) west.

Lot four (4), section thirty-one (31), township thirteen (13), range six (6) west.

The northwest quarter of the southwest quarter of section thirty-one (31), township thirteen (13) north, range six (6) west.

The northwest quarter of the southeast quarter, the southeast quarter of the southeast quarter, the northeast quarter of the southeast quarter, the south-

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\*Page-number appearing at foot of page of original certified Record.

west quarter, and the southwest quarter of the southeast quarter of section thirty-six, township thirteen (13) north, range seven (7) west.

The fractional east half of the northwest quarter of section one (1) township twelve (12) north, range seven (7) west.

Commencing at a stake standing on the north line of section one (1), township twelve (12) north, range seven (7) west twenty (20) chains east from the northwest corner of said section, thence south on subdivision line of the northwest quarter of said section twenty-three (23) chains; thence north thirty-nine (39 deg.) degrees fifty-three (53') minutes west, twenty-nine and sixty-five hundredths (29.65) chains, to the northwest corner of said section; thence east on section line twenty (20) chains to the place of beginning.

That portion of the northwest quarter of the northwest quarter of section (1) township twelve (12) north, range seven (7) west, bounded on the north by the township line, on the south by Cache Creek, on the east by the intersection of Cache Creek and the township line, and on the west by the subdivision line dividing sections one (1) and two (2) of said township.

Lots one (1), two (2), three (3), four (4), five (5) and six (6) of section two (2), township twelve (12) north, range seven (7) west.

The southeast quarter of the northwest quarter of section two (2), township twelve (12) north, range seven (7) west.

That portion of the west half of the northwest

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quarter of said section 2, lying east of the County Road running from Lower Lake to Colusa, and of a line commencing at the northwest corner of the northeast quarter of the southwest quarter of said section two (2); thence north fifty-three (53 deg.) degrees west, eleven and sixty-three hundredths (11.63) chains; thence north forty-one and one-fourth ( $41\frac{1}{4}$ ) degrees west, four and forty-eight [2] hundredths (4.48) chains; thence north twenty-two (22 deg.) degrees west four and twenty-eight hundredths (4.28) chains; thence north twenty-five (25 deg.) degrees east, fourteen (14) chains; thence north seven and one-half ( $7\frac{1}{2}$ ) degrees west sixteen and fifty-eight hundredths (16.58) chains; thence north thirty-two and one-half ( $32\frac{1}{2}$ ) degrees east, five and five hundredths (5.05) chains, and north two (2 deg.) degrees west, seven and twenty-nine hundredths (7.29) chains.

Lots three (3), four (4) and seven (7), and the northeast quarter of the southeast quarter of section thirty-four (34), township thirteen (13) north, range seven (7) west.

Lots one (1) and three (3) of section thirty-five (35), township thirteen (13) north, range seven (7) west.

Said above-described pieces and parcels containing in all one thousand and five (1,005) acres.

The east half of the northeast quarter and the east half of the southeast quarter of section nineteen (19), township twelve (12) north, range seven (7) west.

All of section twenty (20), township twelve (12)

north, range seven (7) west.

The west half of section twenty-one (21) township twelve (12) north, range seven (7) west.

Said last three described pieces and parcels containing one thousand and one hundred and twenty (1,120) acres.

## VII.

That on the said 18th day of November, 1907, the said Central Counties Land Company borrowed of and received from the defendant Capay Ditch Company three several sums of money, in the amounts respectively of five thousand six hundred twenty-five (\$5,625.00) dollars; eight thousand three hundred twenty and 75/100 (\$8,320.75) dollars, and ten thousand six hundred twenty-five (\$10,625.00) dollars, and made, executed and delivered unto the said Capay Ditch Company, defendant herein, its three several promissory notes for said respective amounts, said promissory notes being respectively in words and figures following, to wit:

“\$5625.00

San Francisco, November 18th, 1907.

On or before August 1, 1908, Central Counties Land Company, a California corporation, promises to pay to the Capay Ditch Co., or order, at its office in the City of Woodland, State of California, the sum of five thousand six hundred and twenty-five (\$5625.00) dollars, with interest commencing April 1st, 1908, at the rate of seven per cent (7%) per an-

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num, both principal and interest payable in United States Gold Coin.

(Signed)

CENTRAL COUNTIES LAND COMPANY.

By L. S. LACY,

Vice-President.

By EDWARD O. ALLEN,

Secretary. [3]

(Endorsed: E. P. Vandercook. J. Dalzell Brown.  
Demand, Notice of Nonpayment and Protest  
Waived. E. P. Vandercook. J. Dalzell Brown.)"

"\$8320.75

San Francisco, Cal., November 18, 1907.

On or before August 1, 1908, Central Counties Land Company, a California corporation, promises to pay to the Capay Ditch Co., or order, at its office, in the City of Woodland, State of California, the sum of eight thousand three hundred and twenty and 75/100 (\$8320.75) dollars, with interest commencing January 19, 1908, at the rate of seven per cent (7%) per annum, both principal and interest payable in United States Gold Coin.

(Signed) CENTRAL COUNTIES LAND COMPANY.

By L. S. LACY,

Vice-President.

EDWARD O. ALLEN,

Secretary.

(Endorsed: E. P. Vandercook. J. Dalzell Brown.  
Demand, Notice of Nonpayment and Protest  
Waived. E. P. Vandercook. J. Dalzell Brown.)"  
" \$10,625.00

San Francisco, Cal., November 18, 1907.

On or before August 1, 1908, Central Counties Land Company, a California corporation, promises to pay to the Capay Ditch Company, or order, at its office in the City of Woodland, State of California, the sum of ten thousand six hundred and twenty-five (\$10,625.00) dollars, with interest from date at the rate of seven per cent (7%) per annum, both principal and interest payable in United States Gold Coin.

(Signed) CENTRAL COUNTIES LAND COMPANY.

By L. S. LACY,

Vice-President.

EDWARD O. ALLEN,

Secretary.

(Endorsed: E. P. Vandercook. J. Dalzell Brown.  
Demand, Notice of Nonpayment and Protest  
Waived. E. P. Vandercook, J. Dalzell Brown.)"

[4]

## VIII.

That contemporaneously with the execution and delivery of the said promissory notes, and as a part and parcel of the same transaction, and solely for the purpose of securing the payment of the said promissory notes, together with interest thereon, at the times and in the manner therein provided for, the said Central Counties Land Company made, executed and delivered unto said Capay Ditch Company, an instrument in writing in form a deed, but intended as a mortgage, which said instrument was

in substantially the words and figures following:

"THIS INDENTURE made and entered into this 18th day of November, 1907, by and between Central Counties Land Company, a California corporation, party of the first part, and Capay Ditch Company, a California corporation, party of the second part WITNESSETH:

That the party of the first part, for and in consideration of the sum of ten dollars, gold coin of the United States, to it in hand paid by the party of the second part, receipt whereof is hereby acknowledged, has bargained, granted, sold and conveyed, and does by these presents grant, bargain, sell and convey unto the party of the second part, its successors and assigns, all those certain lots, pieces or parcels of real property, situate, lying and being in the County of Lake, State of California, and described as follows:—

Lots two (2), three (3) and four (4), section six (6), township twelve (12) north, range six (6) west.

Lot four (4) section thirty-one (31), township thirteen (13) north, range six (6) west.

The northwest quarter of the southwest quarter of section thirty-one (31), township thirteen (13) north, range six (6) west.

The northwest quarter of the southeast quarter, the southeast quarter of the southeast quarter, the northeast quarter of the southeast quarter, the southwest quarter and the southwest quarter of the southeast quarter of section thirty-six (36) township thirteen (13) north, range seven (7) west.

The fractional east half of the northwest quarter

of section one (1) township twelve (12) north, range seven (7) west.

Commencing at a stake standing on the north line of section one (1) township twelve (12) north, range seven (7) west, twenty (20) chains east from the northwest corner of said section; thence south on subdivision line of the northwest quarter of said section; twenty-three (23) chains; thence north thirty-nine (39 deg.) degrees fifty-three (53') minutes west, twenty-nine and sixty-five hundredths (29.65) chains to the northwest corner of said section; thence east on section line twenty (20) chains to the place of beginning.

That portion of the northwest quarter of the northwest quarter of section one (1), township twelve (12) north, range seven (7) west, bounded on the north by the township line, on the south by Cache Creek, on the east by the intersection of Cache Creek and the township line, and on the west by the [5] subdivision line dividing sections one (1) and two (2) of said township.

Lots one (1), two (2), three (3), four (4), five (5) and six (6), of section two (2), township twelve (12) north, range seven (7) west.

The southeast quarter of the northwest quarter of section two (2), township twelve (12) north, range seven (7) west.

That portion of the west half of the northwest quarter of said section two (2) lying east of the County Road running from Lower Lake to Colusa, and of a line commencing at the northwest corner of the northeast quarter of the southwest quarter of

10      *Power & Irrigation Co. of Clear Lake*

said section two (2); thence north fifty-three (53 deg.) degrees west, eleven and sixty-three hundredths (11.63) chains; thence north forty-one and one-fourth ( $41\frac{1}{4}$ ) degrees west, four and forty-eight hundredths (4.48) chains; thence north twenty-two (22 deg.) degrees west four and twenty-eight hundredths (4.28) chains; thence north twenty-five (25 deg.) degrees east, fourteen (14) chains, thence north seven and one-half ( $7\frac{1}{2}$ ) degrees west sixteen and fifty-eight hundredths (16.58) chains; thence north thirty-two and one-half ( $32\frac{1}{2}$  deg.) degrees east, five and five-hundredths (5.05) chains, and north two (2 deg.) degrees west, seven and twenty-nine hundredths (7.29) chains.

Lots three (3), four (4) and seven (7), and the northeast quarter of the southeast quarter of section thirty-four (34), township thirteen (13) north, range seven (7) west.

Lots one (1) and three (3) of section thirty-five (35), township thirteen (13) north, range seven (7) west.

Said above-described pieces and parcels containing in all one thousand and five (1,005) acres.

The east half of the northeast quarter, and the east half of the southeast quarter of section nineteen (19), township twelve (12) north, range seven (7) west.

All of section twenty (20), township twelve (12) north, range seven (7) west.

The west half of section twenty-one (21) township twelve (12) north, range seven (7) west.

Said last three described pieces and parcels con-

taining one thousand and one hundred and twenty (1,120) acres.

TOGETHER with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

TO HAVE AND TO HOLD the above described property, together with the appurtenances unto the said party of the second part, its successors and assigns forever.

This conveyance is made, executed and delivered in pursuance of a resolution of the Board of Directors of Central Counties Land Company, duly adopted under the provisions of law and the by-laws of said corporation, authorizing and directing the President and Secretary to make, execute and deliver this conveyance.

IN WITNESS WHEREOF, said Central Counties Land Company, a California corporation, has caused these premises to be subscribed by its President and Secretary, thereunto duly authorized, and its corporate seal to be hereto affixed the day and year first hereinabove written.

[Corporate Seal]

(Signed) CENTRAL COUNTIES LAND  
COMPANY.

By LED. F. WINCHELL,  
President.

EDWARD O. ALLEN,  
Secretary. [6]

**IX.**

That the resolution of the Board of Directors of said Central Counties Land Company, authorizing and directing the President and Secretary of said corporation to make, execute and deliver the above and foregoing instrument,—being the same resolution referred to in said instrument, a copy of which is above set forth,—was and is in the words and figures following, to wit:

“BE IT RESOLVED that this corporation offer and deposit as security for the payment of the notes authorized in the foregoing resolutions, such security to be returned in the event of such payment, the deed of this corporation conveying to the Capay Ditch Company, a California corporation, that certain property in Lake County, California, conveyed to this corporation by said Capay Ditch Company by deed dated January 24th, 1907, and recorded in volume 39 of Deeds, at page 355 and following, Records of Lake County, excepting therefrom the swamp and overflowed lands therein described; and also as such security debenture certificates of this Company, as authorized August 13th, 1906, of the face value amounting to Five thousand dollars (\$5,000.00); and

“BE IT FURTHER RESOLVED that the President and Secretary of this corporation be and they are hereby authorized and directed to execute under its official seal the grant, bargain and sale deed of this corporation, as aforesaid, and also to execute and issue debenture certificates of this corporation, as aforesaid, and to deposit the same as

security for the payment of said notes, and to do any acts which they may deem necessary to effectuate the intent of this resolution."

#### X.

That the property referred to in the above and foregoing resolution as "that certain property in Lake County, California, conveyed to this corporation by said Capay Ditch Company by deed dated January 24th, 1907, and recorded in volume 39 of Deeds, at page 355 and following, Records of Lake County, excepting therefrom the swamp and overflowed lands therein described," is the same property hereinbefore particularly described in paragraphs VI and VIII of this Bill.

#### XI.

That thereafter, and on the 20th day of March, 1908, the said defendant Capay Ditch Company caused the said written [7] instrument to be recorded in volume 41 of Deeds, at page 161, of the records of the County of Lake, State of California.

#### XI.

That in addition to the execution and delivery of the said instrument, in form a deed but intended as a mortgage, as aforesaid, and as further security for the payment of the promissory notes therein referred to, said Central Counties Land Company issued, executed and delivered unto the said defendant Capay Ditch Company debenture certificates issued by said Central Counties Land Company, of the face or par value of five thousand (\$5,000.00) dollars, which said debentures were respectively in words and figures as follows, to wit:

“UNITED STATES OF AMERICA.

STATE OF CALIFORNIA.

\$500                          No. ——                          \$500

CENTRAL COUNTIES LAND COMPANY.

Incorporated Under the Laws of the State of California.

Authorized Capital Stock One Million Dollars.

San Francisco, California, September 1st, 1906.

For value received, Central Counties Land Company promises to pay to bearer, at its office in the City and County of San Francisco, State of California, on the 1st day of September, A. D. 1926, the sum of Five Hundred Dollars (\$500.00) in gold coin, of the United States of America of the present standard of weight and fineness, together with interest thereon, from date until paid at the rate of six per cent a year in like gold coin, payable semi-annually on the first days of January and July of each year at its said office in the City and County of San Francisco, State of California.

PROVIDED, however, that Central Counties Land Company may at any time retire this debenture certificate upon payment of the principal and interest to date of payment; and whenever Central Counties Land Company shall publish a notice for thirty consecutive days, in a daily newspaper published in the City and County of San Francisco, State of California, of its intention to retire this debenture certificate, and to pay the holder thereof the principal and interest as herein provided, on a day not more than forty days but not less than thirty

days after the commencement of the publication of said notice, the holder hereof shall present the same for payment, and if it is not so presented for payment, this certificate shall cease to bear interest from and after said day, but the principal and interest thereon up to and including said day, shall be payable to the holder hereof on demand.

This debenture certificate is one of a series of two thousand (2000) certificates of like form, tenor and effect, [8] and of like amount, bearing date this day, and numbered consecutively from 1 to 2000, both inclusive, amounting in the aggregate to one million dollars (\$1,000,000.00), and all the property of Central Counties Land Company now owned, and all that it may hereafter acquire, is hereby mortgaged and pledged to secure the payment of the principal and interest of this debenture certificate, and of all the other certificates of this series, and all of said certificates of this series are hereby constituted a lien on all the property of Central Counties Land Company, now owned, or hereafter acquired, provided, however, that Central Counties Land Company may sell any of the property hereby mortgaged, pledged or hypothecated to secure this debenture certificate free and clear from the lien created hereby, whenever the Board of Directors of said Company, by a resolution duly and regularly adopted, so direct; but the proceeds of said sale shall, in that event, be applied to the redemption of certificates of indebtedness of the series of which this is one, or be used for the purchase of property deemed by its Board of Directors to be suitable for

the purposes of this corporation.

This debenture certificate shall not be valid until the certificate endorsed hereon shall have been signed by the California Safe Deposit and Trust Company.

IN WITNESS WHEREOF, Central Counties Land Company has caused this debenture certificate to be executed, and its corporate name and seal to be hereunto signed and affixed, by its President and Secretary, thereunto duly authorized, the day and year first hereinabove written.

CENTRAL COUNTIES LAND COMPANY.

---

President.

---

Secretary.

#### TRUSTEE'S CERTIFICATE.

It is hereby certified that the within certificate is one of a series of two thousand (2,000) certificates of like tenor, effect, date and amount.

CALIFORNIA SAFE DEPOSIT AND TRUST COMPANY,

By \_\_\_\_\_,

Secretary."

That each of said debenture certificates so given as security as aforesaid was signed by said California Safe Deposit and Trust Company.

#### XII.

That the defendant Yolo County Consolidated Water Company, and the defendants L. D. Stephens and Joseph Craig, at all times had actual knowledge

and notice of the nature of the aforesaid transactions, and of the terms and conditions thereof, and at all times well knew that the said instrument was intended to be, and was, a mortgage given to secure the payment of the said promissory notes, and that the defendant Yolo Water and Power Company has, at all times since its [9] incorporation, had actual knowledge and notice that said instrument was a mortgage.

That, notwithstanding the said actual knowledge and notice of said Yolo County Consolidated Water Company as to the true nature of the aforesaid instrument hereinabove set forth, the said defendant Capay Ditch Company, on or about the 18th day of December, 1911, made, executed and delivered to the said defendant, Yolo County Consolidated Water Company, an instrument, in form a grant, bargain and sale deed, wherein and whereby the said defendant Capay Ditch Company purports to convey to the said defendant Yolo County Consolidated Water Company all of the real property so held by it as security as aforesaid.

That thereafter, and notwithstanding the said actual knowledge and notice of said defendants L. D. Stephens and Joseph Craig as to the true nature of the aforesaid instrument hereinabove set forth, the said defendant Yolo County Consolidated Water Company made, executed and delivered to the defendants L. D. Stephens and Joseph Craig, an instrument in writing, in form a grant, bargain and sale deed, wherein and whereby the said defendant Yolo County Consolidated Water Company pur-

ports to convey unto said defendants L. D. Stephens and Joseph Craig all of the real property so held by it as security as aforesaid.

That, notwithstanding the said actual knowledge and notice of the said defendant Yolo Water and Power Company as to the true nature of the aforesaid instrument, hereinabove set forth, the said defendants L. D. Stephens and Joseph Craig thereafter, and on or about the 20th day of December, 1911, signed and acknowledged an instrument, in form a deed, purporting to convey the said real properties to the defendant Yolo Water and Power Company, and, as plaintiff is informed and [10] believes, and on such information and belief avers, that the said last-named defendants L. D. Stephens and Joseph Craig, on or about the 17th day of June, 1912, delivered the said instrument to the defendant Yolo Water and Power Company.

### — XIII. —

That after the said Central Counties Land Company acquired the ownership and title of and to the real property hereinabove described, as aforesaid, the defendant, J. M. Adamson, prior to the said 18th day of November, 1907, entered into possession of the whole thereof as the tenant of the said Central Counties Land Company, and duly attorned to the said Central Counties Land Company and paid to the said Central Counties Land Company the rental due therefor, at the rate of two hundred dollars per annum, or thereabouts, and regularly paid said rental for all the years preceding the year ending on or about the 30th day of November, 1911.

## XIV.

That said Central Counties Land Company through inadvertence and oversight, failed to pay its license taxes to the State of California, due in the year 1911, and, pursuant to proceedings duly taken by the State of California, to that end, its right to do business as a corporation became and was forfeited on the 30th day of November, 1911; that thereupon all of the former directors of said corporation became, under and by virtue of the provisions of the laws of the State of California, Trustees of the corporation for the benefit of its creditors and stockholders.

## XV.

That the said defendant J. M. Adamson has at all times been and still is in possession of said property, but that said Adamson has, since said Central Counties Land Company forfeited its charter as aforesaid, refused and neglected to [11] pay the rental of said property to the Central Counties Land Company, or to its Trustees, and without the consent of the said Central Counties Land Company, or of its said Trustees, or of its or their successors, said defendant Adamson has, as plaintiff is informed and believes, and on such information and belief avers, attempted to attorn to the defendant Yolo Water and Power Company, and now claims to be in possession of said property as the tenant of the said defendant Yolo Water and Power Company.

That in addition to the rental so paid by the said defendant J. M. Adamson to the said Central Counties Land Company, the said defendant Adam-

son, as a part of the consideration for the possession of said property, rendered personal services in the matter of looking after and keeping up the said property, of the value of eight hundred dollars (\$800.00) per annum, and that the total annual rental value of the said properties at all times has been, and still is, the sum of one thousand dollars (\$1,000.00) per annum. That the said defendant Adamson claims to have paid, since his alleged attornment, some or all of the rentals for the said property, to the defendants, or to some of them.

## XVI.

That on said 30th day of November, 1911, Anson S. Blake, Leigh Sypher, Charles L. Pierce, R. W. Van Norden and Joseph Craig were the duly appointed, qualified and acting directors of the said Central Counties Land Company.

That the defendant Joseph Craig, ever since the date of the forfeiture of the charter of said Central Counties Land Company as aforesaid, has repudiated said trust, and has, in all things, acted in opposition to the interests of the said Central Counties Land Company, and adversely to it and in derogation of the trust which, as aforesaid, devolved upon [12] him as a member of the Board of Directors of said defunct corporation.

## XVII.

That by mesne conveyances from said Board of Trustees, all of the title to said real property hereinabove described has become and is now vested in the plaintiff, and plaintiff is the lawful owner thereof as successor in interest of said Central Counties Land Company.

## XVIII.

That the said Central Counties Land Company had the plan and purpose to erect a dam, for the purpose of impounding the flood waters of Clear Lake in the State of California, and, to that end, to build a dam at the outlet of the said Clear Lake for the purpose of maintaining and holding flood waters of the said lake at high-water mark, and said Central Counties Land Company, during its existence, held the said land hereinabove described partly and principally for the said purpose, and that the Trustees of said Central Counties Land Company, after said corporation had ceased to exist, continued to hold the said lands for the said purpose, all of which was at all times well known to the defendants, and to each and all of them.

## XIX.

That it is the plan and purpose of plaintiff to use said land for the same purpose as that planned and intended by said Central Counties Land Company as aforesaid, and that plaintiff is duly authorized by its charter to make such use thereof.

## XX.

That the said real property hereinabove described contains a portion of the only available damsite for impounding the waters of the said Clear Lake, and the outlet for Clear Lake [13] runs through said lands, and that without the use of the said lands, it will be impossible to store the flood waters of said lake, or for this plaintiff to carry out the purposes of its incorporation, as to said lake.

**XXI.**

That at the time of the execution of the aforesaid instrument by the said defendant Capay Ditch Company, purporting to convey the hereinabove described property to the defendant Yolo County Consolidated Water Company, and at the time of the execution by said last named defendant of the instrument purporting to convey said hereinabove described property to the defendants L. D. Stephens and Joseph Craig, the said defendants Capay Ditch Company, Yolo County Consolidated Water Company, L. D. Stephens and Joseph Craig were each and all indebted to the Trustees of said Central Counties Land Company in the sum or amount of fifteen thousand eight hundred twenty-five (\$15,-825.00) dollars, the same being the balance due from the said last named defendants for and on account of the subscription of the said defendants to six hundred thirty-three (633) shares of the capital stock of said Central Counties Land Company, which said stock was issued to and received by the said defendants last named, and the par value of which said stock was one hundred dollars (\$100.00) per share, but upon which said stock said defendants last named paid into said corporation the sum of seventy-five dollars (\$75.00) per share, and no more; and plaintiff is informed and believes, and upon such information and belief avers, that at said time the said defendants Capay Ditch Company, Yolo County Consolidated Water Company, L. D. Stephens and Joseph Craig were indebted to the said Trustees of said Central Counties Land Company in the sum of

\$15,825.00 for and on account of the balance due on said stock subscriptions, and in divers other large sums and amounts of money, the aggregate of which said amounts and sums of money is far in excess of any sum or amount due [14] from the said Central Counties Land Company, for and on account of the said promissory notes so secured by the said deed from the said Central Counties Land Company to the said defendant Capay Ditch Company, and plaintiff is informed and believes, and upon such information and belief alleges, that the amount so due and owing by the said defendants Capay Ditch Company, Yolo County Consolidated Water Company, L. D. Stephens and Joseph Craig to the said Central Counties Land Company, and its Trustees, or their successors in interest, was, and at all times has been and is, more than sufficient to compensate the demands of the said defendants, or any or either of them, for or on account of the aforesaid promissory notes.

That the said defendants Capay Ditch Company, Yolo County Consolidated Water Company, L. D. Stephens and Joseph Craig have never paid the said amount so due and owing from them as aforesaid, or from any or either of them, or any part or portion thereof, to the said Central Counties Land Company, its Trustees or successors in interest.

## XXII.

That, contemporaneously with their aforesaid transfer to plaintiff of the aforesaid lands, said Trustees of said Central Counties Land Company also transferred to plaintiff above named all of their

aforesaid demands against the said defendants Capay Ditch Company, Yolo County Consolidated Water Company, L. D. Stephens and Joseph Craig.

XXIII.

That an accounting as to the matters aforesaid and of the rents, issues and profits of the said property will be necessary to ascertain the amount, if any, of moneys now due and owing upon the said notes.

XXIV.

That all of the acts and transactions as aforesaid, wherein and whereby said defendant Yolo Water and Power Company claims to [15] own said lands, were done, as aforesaid, with full knowledge and notice of all the rights and equities of the said Central Counties Land Company, and of its Trustees, and of plaintiff as its successor in interest.

That plaintiff has no knowledge or information as to whether or not the defendants, or any or either of them, is still the owner and holder of the aforesaid promissory notes which the aforesaid instrument in writing was given to secure or of any or either of the said notes, and that a discovery will be necessary to ascertain the whereabouts and identity of the present owner and holder of the said notes.

XXV.

That the defendant Yolo Water and Power Company threatens to and will, unless restrained by this Honorable Court, proceed to construct, and will construct, a dam upon the real property hereinabove described, and will construct controlling works thereon, and will cause a considerable portion of the

said lands to be flooded.

#### XXVI.

That plaintiff is the owner and in possession of a large portion of the frontage of said Clear Lake, and that if such dam is built the waters of said lake will thereby be raised and impounded, and all of the lands of plaintiff along said lake frontage will be flooded.

#### XXVII.

That the appointment of a Receiver to take charge of the said property and to collect the rentals therefor pending this litigation is necessary in order to preserve the said property from waste and injury.

#### XXVIII.

That plaintiff is ready, able and willing to pay such sum as may be found, upon an accounting, to be justly due and owing, [16] for principal and interest, to the present owner or owners of each of the said several promissory notes hereinabove set forth, and hereby tenders payment of such amount as may be found to be justly due.

That plaintiff has no plain, speedy, and adequate remedy in the ordinary course of law.

WHEREFORE, plaintiff prays that the aforesaid instrument, dated the 18th day of November, 1907, executed by said Central Counties Land Company to the Capay Ditch Company, one of the defendants herein, and which said instrument is recorded in volume 41 of Deeds, at page 161, of the Lake County, California, records as aforesaid, be adjudged to be a mortgage.

That an account be taken of the rents, issues and

**26      *Power & Irrigation Co. of Clear Lake***

profits of the said property, and of plaintiff's claims against said defendants.

That plaintiff be let into the possession of said property.

That the ownership of the said promissory notes be ascertained and determined, and that leave be granted to this plaintiff to redeem said real property upon paying to the owner and holder, or to the owners and holders, of the said promissory notes the balance, if any, that may be found to be due upon the said notes to such owner or owners.

That a Receiver be appointed to take charge of the said property and to preserve the same from damages, waste or injury during this litigation.

That the defendant Yolo Water and Power Company, its servants, agents, and employees, and all persons acting in conjunction with it, be restrained and forever enjoined from erecting or constructing any dam, or portion of a dam, or flumes, or ditches or controlling works, upon the said real property [17] described in this Bill, or upon any part or portion thereof, or from flooding any part or portion of the said lands, or any other lands belonging to plaintiff; for costs of suit, and for such other, further, different or additional relief as is meet in the premises and conformable to equity.

CHARLES S. WHEELER and  
JOHN F. BOWIE,

Solicitors for Plaintiff.

HARDING & MONROE,  
Of Counsel. [18]

State of California,

City and County of San Francisco,—ss.

H. S. Elliot, being first duly sworn, deposes and says:

That he is the President of Power and Irrigation Company of Clear Lake, an Arizona corporation, the plaintiff above named, and that he makes this affidavit in its behalf;

That he has read the foregoing Complaint, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

H. S. ELLIOT.

Subscribed and sworn to before me this 25th day of April, 1913.

[Seal] ALICE SPENCER,  
Notary Public in and for the City and County of  
San Francisco, State of California.

[Endorsed]: Filed Apr. 25, 1913. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [19]

*In the United States District Court for the Northern  
District of California.*

No. ——. IN EQUITY.

POWER & IRRIGATION COMPANY OF  
CLEAR LAKE, a Corporation,

Plaintiff,

vs.

THE CAPAY DITCH COMPANY, a Corporation,  
YOLO COUNTY CONSOLIDATED  
WATER COMPANY, a Corporation, YOLO  
WATER & POWER COMPANY, a Cor-  
poration, J. M. ADAMSON, L. D.  
STEPHENS, and JOSEPH CRAIG,

Defendants.

**Motion to Dismiss Bill of Complaint.**

Now come all of the defendants, by their solicitors,  
and move the above-named court to dismiss the bill  
of complaint in the above-entitled action, upon the  
following grounds:

I.

That the facts stated in said bill of complaint are  
not sufficient to constitute a valid cause of action in  
equity against these defendants, or either or any of  
them.

II.

That it appears upon the face of the said bill of  
complaint that the cause of action therein attempted  
to be set up is barred by the laches of plaintiff and  
its assigns.

## III.

It appears upon the face of said bill of complaint that the cause of action therein attempted to be set up is barred by the provisions of subdivision 1 of section 337 of the Code of Civil Procedure of the State of California.

## IV.

It appears upon the face of said bill of complaint that the cause of action therein attempted to be set up is barred by [20] the provisions of section 343 of the Code of Civil Procedure of the State of California.

A. E. SHAW,  
BERT SCHLESINGER,  
S. C. DENSON,  
THEODORE A. BELL,  
JOHN S. PARTRIDGE,

Solicitors and of Counsel for Defendants.

Receipt of copy of the within Motion to Dismiss Bill of Complaint this 9th day of June, 1913, is hereby admitted.

CHARLES S. WHEELER and  
JOHN F. BOWIE,  
Solicitors for Plaintiff.

HARDING & MONROE,  
Of Counsel.

[Endorsed]: Filed Jun. 9, 1913. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [21]

*In the District Court of the United States, for the  
Northern District of California.*

No. 14—EQUITY.

Division 2.

POWER AND IRRIGATION COMPANY OF  
CLEAR LAKE, a Corporation,

Plaintiff,

vs.

CAPAY DITCH COMPANY, a Corporation,  
YOLO COUNTY CONSOLIDATED  
WATER COMPANY, a Corporation, YOLO  
WATER AND POWER COMPANY, a Cor-  
poration, J. M. ADAMSON, L. D. STE-  
PHENS and JOSEPH CRAIG,

Defendants.

**Notice of Hearing Motion to Dismiss Bill of  
Complaint.**

To the Defendants, and Each of Them, in the Above-  
entitled Action, and to Messrs. A. E. Shaw, Bert  
Schlessinger, S. C. Denson, Theodore A. Bell,  
and John S. Partridge, Their Attorneys:

You, and each of you, will please take notice that  
the defendants' Motion to Dismiss the Bill of Com-  
plaint in the above-entitled action, will be called for  
hearing in the above-entitled court, Division 2, at the  
courtroom of said Court in the Postoffice Building,  
San Francisco, California, on Monday, June 16, 1913,  
at 10 o'clock A. M.

Dated June 10, 1913.

CHARLES S. WHEELER and

JOHN F. BOWIE,

Attorneys for Plaintiff.

HARDING & MONROE,

Of Counsel.

Due service and receipt of a copy of the within  
Notice this 10th day of June, 1913, is hereby admitted.

BERT SCHLESINGER,

A. E. SHAW,

THEODORE A. BELL,

JOHN S. PARTRIDGE,

S. C. DENSON,

DENSON, COOLEY & DENSON,

Attorneys for Defendants.

[Endorsed]: Filed Jun. 10, 1913. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [22]

*In the District Court of the United States, in and  
for the Northern District of California, Second  
Division.*

No. 14—IN EQUITY.

POWER AND IRRIGATION COMPANY OF  
CLEAR LAKE, a Corporation,

Plaintiff,  
vs.

CAPAY DITCH COMPANY, a Corporation,  
YOLO COUNTY CONSOLIDATED  
WATER COMPANY, a Corporation, YOLO  
WATER AND POWER COMPANY, a Cor-  
poration, J. M. ADAMSON, L. D. STE-  
PHENS and JOSEPH CRAIG,

Defendants.

**Opinion and Order Dismissing Bill.**

CHARLES S. WHEELER and JOHN F.  
BOWIE, Attorneys for Plaintiff.

A. E. SHAW, BERT SCHLESINGER, DEN-  
SON, COOLEY & DENSON, THEODORE  
A. BELL and MASTICK & PARTRIDGE,  
Attorneys for Defendants.

The plaintiff is a corporation organized under the laws of the State of Arizona.

The complaint avers that the Central Counties Land Company, a corporation, organized under the laws of the State of California, was on November 18th, 1907, the owner of certain lands in Lake County, and on that day borrowed from defendant Capay Ditch Company three several sums of money,

\$5,625.00, \$8,320.75 and \$10,625.00, and executed and delivered to said ditch company its three several promissory notes for the said amounts all payable on or before August 1st, 1908. That contemporaneously, and as a part of the same transaction, and solely for the purpose of securing the payment of said notes, the said Central Counties Land Company executed and delivered to said ditch company an instrument in writing, in form a grant, bargain and sale deed, but intended as a mortgage, conveying to said ditch company the said lands in Lake County; that on December 18th, 1911, the said ditch company conveyed said lands to defendant Yolo County Consolidated Water Company, which company thereafter conveyed the said lands to defendants L. D. Stephens and Joseph Craig, who in turn conveyed the same to defendant Yolo Water and Power Company, and that each and all of the defendants named took said conveyances with full knowledge of the real nature of the original deed from the Central Counties Land [23] Company to the Capay Ditch Company; that plaintiff is the successor in interest of said Central Counties Land Company, and all of the title of said lands has, by mesne conveyances, become and is now vested in plaintiff, and that all of the demands of said Central Counties Land Company against the defendants have been transferred to plaintiff.

This action seeks to have the deed to the Capay Ditch Company adjudicated a mortgage, and that leave be granted plaintiff to redeem said land by paying whatever is found to be due such defendants

as may be entitled to it. Possession of the land is also sought, as well as an accounting of the rents, issues, and profits thereof. It is further asked that a receiver be appointed to take charge of said lands and preserve the same, and that defendant Yolo Water & Power Company be enjoined from doing certain contemplated work thereon. A number of other averments of the complaint are omitted from this statement, because they have no bearing upon the question to be determined at this time.

This question arises upon a motion to dismiss the bill, upon several grounds. The one chiefly insisted upon being that the Court is without jurisdiction, because the suit is one upon a chose in action; and as the Central Counties Land Company, because a citizen of this State, could not maintain the action in this court, neither can plaintiff, its successor, do so, although a citizen of another State. This brings up for consideration the following provisions of section 24 of the Judicial Code: "No District Court shall have cognizance of any suit \* \* \* to recover upon any promissory note or other chose in action in favor of any assignee \* \* \* unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made."

It is strongly urged that this is not a suit upon a chose in action, but is a suit to quiet title. However the action may be denominated, it seems quite clear to me that what is [24] sought here is the enforcement of the original contract between the Central Counties Land Company and the Capay Ditch Com-

pany, and the rights asserted are based wholly thereon.

The Court is asked to declare the instrument in the form of deed to be a mortgage, and to do this because the parties agreed that it was such. If it were not for this agreement, plaintiff would have no cause of action against defendants. This agreement is a chose in action, and this suit being to recover upon it, falls within the terms of section 24, above quoted, and cannot be maintained.

The motion to dismiss will, therefore, be granted.

March 10, 1914.

M. T. DOOLING,  
Judge.

[Endorsed]: Filed Mar. 10, 1914. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [25]

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At a stated term, to wit, the March term, A. D. 1914, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the court-room in the City and County of San Francisco, on Tuesday, the 10th day of March, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable MAURICE T. DOOLING, District Judge.

EQUITY—14.

POWER & IRRIGATION CO. OF CLEAR LAKE

vs.

CAPAY DITCH CO. et al.

**Order Granting Defendants' Motion to Dismiss  
Bill.**

Defendants' motion to dismiss the bill, heretofore heard and submitted, being now fully considered and the Court having filed its opinion thereon, it was ordered that said motion be and the same is hereby granted. [26]

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*In the District Court of the United States, for the  
Northern District of California, Second Division.*

**EQUITY—14.**

**POWER AND IRRIGATION COMPANY OF  
CLEAR LAKE, a Corporation,**

**Plaintiff,**

**vs.**

**CAPAY DITCH COMPANY, a Corporation et al.,  
Defendants.**

**Decree.**

This matter came on to be heard on the 24th day of January, 1914, upon a motion made by the defendants to dismiss plaintiff's bill of complaint upon the ground that the above-entitled court is without jurisdiction to hear and determine the said cause; whereupon the said motion was argued by counsel for the respective parties, and submitted to the Court for its decision, and all and singular, the premises having been duly considered by the Court, and it appearing that the said Court is without jurisdiction to hear and determine the said cause,—

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the said bill of complaint and the said cause be and the same are hereby dismissed, and that said defendants recover their costs herein, taxed at the sum of \$6.10.

M. T. DOOLING,  
Judge of Said Court.

[Endorsed]: Filed and Entered March 24, 1914.  
Walter B. Maling, Clerk. By J. A. Schaertzer,  
Deputy Clerk. [27]

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*In the District Court of the United States for the  
Northern District of California, Second Division.*

No. 14—EQUITY.

POWER AND IRRIGATION COMPANY OF  
CLEAR LAKE, a Corporation,

Plaintiff,

vs.

CAPAY DITCH COMPANY, a Corporation,  
YOLO COUNTY CONSOLIDATED  
WATER COMPANY, a Corporation, YOLO  
WATER AND POWER COMPANY, a Cor-  
poration, J. M. ADAMSON, L. D. STE-  
PHENS and JOSEPH CRAIG,

Defendants.

**Petition for Order Allowing Appeal and Order  
Allowing Appeal.**

To the Honorable Court Above Entitled:

The above-named plaintiff, Power and Irrigation Company of Clear Lake, a corporation, considering

itself aggrieved by the decree made and entered in the above-entitled court on the 24th day of March, 1914, in the above-entitled cause, hereby appeals therefrom to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, for the reasons and upon the grounds specified in its Assignment of Errors filed herewith, and prays that this Appeal may be allowed; and that a transcript of the record, proceedings, and papers upon which said decree was made and entered as aforesaid, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, sitting at San Francisco, California.

And your petitioner further prays that the proper order touching the security to be required of it to perfect its said appeal, be made.

CHARLES S. WHEELER and  
JOHN F. BOWIE,  
Solicitors for Plaintiff. [28]

**Order Allowing Appeal [and Fixing Amount of Bond].**

The foregoing Petition for Appeal is hereby granted, and the appeal is allowed, upon the petitioner filing a bond in the sum of Three Hundred Dollars (\$300.00), to be conditioned as required by law.

Dated September 23, 1914.

M. T. DOOLING,  
Judge.

[Endorsed]: Filed Sept. 23d, 1914. Walter B. Maling, Clerk. [29]

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*In the District Court of the United States for the Northern District of California, Second Division.*

No. 14—EQUITY.

POWER AND IRRIGATION COMPANY OF CLEAR LAKE, a Corporation,

Plaintiff,

vs.

CAPAY DITCH COMPANY, a Corporation,  
YOLO COUNTY CONSOLIDATED  
WATER COMPANY, a Corporation, YOLO  
WATER AND POWER COMPANY, a Corporation,  
J. M. ADAMSON, L. D. STEPHENS and JOSEPH CRAIG,

Defendants.

**Assignment of Errors on Appeal.**

Now comes the plaintiff in the above-entitled action by its attorneys, Charles S. Wheeler and John F. Bowie, and avers that the decree entered in the above-entitled cause on the 24th day of March, 1914, is erroneous and unjust to the plaintiff, and files with its petition for an appeal from the said decree, the following Assignment of Errors, and specifies that the said decree is erroneous in each and every of the following particulars, viz.:

1. The said District Court of the United States for the Northern District of California was not without jurisdiction to hear and determine the said cause,

and the order, judgment, and decree of said Court granting defendant's motion and dismissing the said bill of complaint and the said cause for want of jurisdiction is therefore erroneous.

2. The said Court erred in holding that section 24 of the Judicial Code deprived it of jurisdiction in the above-entitled cause, forasmuch as the provisions of said section 24 are not applicable to the case at bar.

3. The said Court erred in holding that plaintiff's cause [30] of action is based upon a chose in action within the meaning of that phrase as used in section 24 of the Judicial Code, forasmuch as plaintiff's cause of action is not based on a chose in action within the meaning of that phrase as used in section 24 of the Judicial Code, but is an action to remove a cloud from a title and to redeem from a mortgage, and for an injunction to restrain the erection of a dam and for other equitable relief.

4. The Court erred in holding that the rights of the Central Counties Land Company in and to the real property in controversy, to which rights plaintiff succeeded by mesne conveyances, constitute a mere chose in action within the meaning of that phrase as used in section 24 of the Judicial Code.

5. The said Court erred in holding that plaintiff's action is an action upon an agreement between the parties that an instrument in form of a deed shall be considered a mortgage, forasmuch as the law and not any agreement of the parties has created the rights asserted in the bill.

6. The Court erred in holding that plaintiff is the assignee of a mere chose in action as regards the lands

described in the bill, forasmuch as the title to the lands in question is shown by said bill to be presently vested in the plaintiff.

7. The Court erred in holding that the bill seeks the enforcement of the original contract between the Central Counties Land Company and the Capay Ditch Company, forasmuch as such is not the gravamen of plaintiff's cause of action.

8. The Court erred in holding that the rights asserted in the action are based wholly upon the original contract between the Central Counties Land Company and the Capay Ditch Company; whereas, the fact is, that the rights and equities relied on in the bill arise out of the circumstance that by mandate [31] of express law no title passed under the indenture set forth in the bill.

WHEREFORE, the plaintiff prays that the said decree be corrected or reversed, and the District Court directed to deny said Motion to Dismiss, or that such other relief be awarded as the nature of the case demands.

CHARLES S. WHEELER and  
JOHN F. BOWIE.

Attorneys for Plaintiff.

[Endorsed]: Filed Sept. 23d, 1914. Walter B. Maling, Clerk. [32]

*In the District Court of the United States for the Northern District of California, Second Division.*

No. 14—EQUITY.

POWER AND IRRIGATION COMPANY OF CLEAR LAKE, a Corporation,

Plaintiff,

vs.

CAPAY DITCH COMPANY, a Corporation; YOLO COUNTY CONSOLIDATED WATER COMPANY, a Corporation; YOLO WATER AND POWER COMPANY, a Corporation; J. M. ADAMSON; L. D. STEPHENS, and JOSEPH CRAIG,

Defendants.

**Bond on Appeal.**

KNOW ALL MEN BY THESE PRESENTS, That we, Power and Irrigation Company of Clear Lake, as principal, and Pacific Coast Casualty Co., as surety, of the City and County of San Francisco, State of California, are held firmly bound unto Capay Ditch Company, a corporation; Yolo Consolidated Water Company, a corporation; Yolo Water and Power Company, a corporation; J. M. Adamson, L. D. Stephens, and Joseph Craig in the sum of \$300, lawful money of the United States, to be paid to them and their respective executors, administrators, and successors and assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our succes-

sors and assigns, by these presents.

Sealed with our seals and dated this 23d day of September, 1914.

WHEREAS, the above-named Power and Irrigation Company of Clear Lake has obtained an appeal to the Circuit Court of [33] Appeals of the United States to correct or reverse the decree of the District Court for the Ninth District of California, in the above-entitled cause.

NOW, THEREFORE, the condition of this obligation is such that if the above-named Power and Irrigation Company of Clear Lake shall prosecute its said appeal to effect and answer all costs if it fails to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

POWER AND IRRIGATION COMPANY  
OF CLEAR LAKE.

By H. S. ELLIOT,  
President.

By R. H. BORLAND.

[Seal Power and Irrigation Company.]

PACIFIC COAST CASUALTY COMPANY.

By R. W. STEWART,  
Attorney in Fact.

[Seal Pacific Coast Casualty Company.]

Approved September 23d, 1914.

M. T. DOOLING,  
Judge.

[Endorsed]: Filed Sept. 23d, 1914. Walter B.  
Maling, Clerk. [34]

*In the United States District Court for the Northern  
District of California, Second Division.*

No. 14—EQUITY.

POWER AND IRRIGATION COMPANY OF  
CLEAR LAKE, a Corporation,

Plaintiff,

vs.

CAPAY DITCH COMPANY, a Corporation; YOLO  
COUNTY CONSOLIDATED WATER COM-  
PANY, a Corporation; YOLO WATER AND  
POWER COMPANY, a Corporation; J. M.  
ADAMSON; L. D. STEPHENS and JO-  
SEPH CRAIG,

Defendants.

**Praecipe for Transcript on Appeal.**

To the Clerk of Said Court:

Sir: Please make up, print, and issue in the above-entitled cause a certified transcript of the record, upon an appeal allowed in this cause, to the Circuit Court of Appeals of the United States for the Ninth Circuit, sitting at San Francisco, California, the said transcript to include the following:

Bill to Redeem;

Motion to Dismiss Bill of Complaint;

Notice of Hearing Motion to Dismiss Bill of Com-  
plaint;

Opinion of Court (Dooling, J.);

Minute Order of Tuesday, March 10, 1914;

Decree Dismissing Bill;

Petition for Allowance of Appeal, and Order Endorsed Thereon;

Assignment of Errors on Appeal;

Citation on Appeal;

Bond on Appeal;

Praecipe for Transcript. [35]

You will please transmit to the Circuit Court of Appeal, with the record to be prepared as above, the Original Citation on Appeal.

CHARLES S. WHEELER, and  
JOHN F. BOWIE,

Solicitors for Appellant.

Service and receipt of a copy of the within Prae-  
cipe this 23d day of September, 1914, is hereby ad-  
mitted.

MASTICK & PARTRIDGE,  
A. E. SHAW,  
BERT SCHLESINGER,  
DENSON, COOLEY & DENSON,  
Attorneys for Defendants.

[Endorsed]: Filed Sep. 23, 1914. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [36]

*In the District Court of the United States, in and for  
the Northern District of California.*

No. 14—EQUITY.

POWER AND IRRIGATION COMPANY OF  
CLEAR LAKE, a Corporation,

Plaintiff,

vs.

CAPAY DITCH COMPANY, a Corporation; YOLO  
COUNTY CONSOLIDATED WATER COM-  
PANY, a Corporation; YOLO WATER AND  
POWER COMPANY, a Corporation; J. M.  
ADAMSON; L. D. STEPHENS and JO-  
SEPH CRAIG,

Defendants.

**Clerk's Certificate to Record on Appeal.**

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing thirty-six (36) pages, numbered from 1 to 36, inclusive, to be full, true and correct copies of the records and proceedings as enumerated in the praecipe for transcript of record, as the same remain on file and of record in the above-entitled cause, and that the same constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is \$24.60; that said amount was paid by Charles S. Wheeler and John F. Bowie, Esqs.; and that the original Citation issued herein is hereto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 21st day of October, A. D. 1914.

[Seal]

WALTER B. MALING,

Clerk.

By J. A. Schaertzer,

Deputy Clerk. [37]

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*In the United States Circuit Court of Appeals for the Ninth Judicial Circuit.*

POWER AND IRRIGATION COMPANY OF CLEAR LAKE, a Corporation,

Plaintiff and Appellant,

vs.

CAPAY DITCH COMPANY, a Corporation; YOLO COUNTY CONSOLIDATED WATER COMPANY, a Corporation; YOLO WATER AND POWER COMPANY, a Corporation; J. M. ADAMSON; L. D. STEPHENS, and JOSEPH CRAIG,

Defendants and Appellees.

**Citation on Appeal [Original].**

United States of America,—ss.

The President of the United States, to Capay Ditch Company, a Corporation, Yolo County Consolidated Water Company, a Corporation, Yolo Water and Power Company, a Corporation, J. M. Adamson, L. D. Stephens, and Joseph Craig,  
Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals,

for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, on the 22 day of October, 1914, being within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the District Court of the United States for the Northern District of California, in the suit numbered 14—Equity, in the records of said court, wherein Power and Irrigation Company of Clear Lake, a corporation, is plaintiff and appellant, and you and each of you are defendants and appellees, to show cause, if any there be, why the decree rendered against the said plaintiff and appellant, as in said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in [38] that behalf.

WITNESS, the Honorable M. T. DOOLING, United States District Judge for the Northern District of California, this 23 day of September, 1914.

M. T. DOOLING,  
Judge. [39]

Service and receipt of a copy of the within Citation this 23d day of September, 1914, is hereby admitted.

MASTICK & PARTRIDGE,  
A. E. SHAW,  
BERT SCHLESINGER,  
DENSON, COOLEY & DENSON,  
Attorneys for Defendants.

[Endorsed]: No. 14. In the United States Circuit Court of Appeals for the Ninth Circuit. Power and Irrigation Company of Clear Lake, a Corporation, Plaintiff, vs. Capay Ditch Company, a Corporation,

et al., Defendants. Citation on Appeal. Filed Sep. 23, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

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[Endorsed]: No. 2500. United States Circuit Court of Appeals for the Ninth Circuit. Power and Irrigation Company of Clear Lake, a Corporation, Appellant, vs. Capay Ditch Company, a Corporation, Yolo County Consolidated Water Company, a Corporation, Yolo Water and Power Company, a Corporation, J. M. Adamson, L. D. Stephens and Joseph Craig, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Second Division.

Filed October 21, 1914.

FRANK D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.



No. 2500.

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IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT.

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POWER AND IRRIGATION COMPANY OF CLEAR  
LAKE, a Corporation,

Appellant,

vs.

CAPAY DITCH COMPANY, a Corporation, YOLO  
COUNTY CONSOLIDATED WATER COMPANY, a  
Corporation, J. M. ADAMSON, L. D. STEPHENS and  
JOSEPH CRAIG,

Appellees.

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**BRIEF OF APPELLANT.**

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CHARLES S. WHEELER and  
JOHN F. BOWIE,  
Attorneys for Plaintiff and Appellant.

HARDING & MONROE,  
Of Counsel.

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Filed this..... day of March, 1915.

F. D. MONCKTON, Clerk,

By....., Deputy Clerk.

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THE JAMES H. BARRY CO.

Filled

MAR 12 - 1915



IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT.

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POWER AND IRRIGATION COMPANY OF CLEAR LAKE, a corporation,

*Appellant,*

vs.

CAPAY DITCH COMPANY, a corporation, YOLO COUNTY CONSOLIDATED WATER COMPANY, a corporation, J. M. ADAMSON, L. D. STEPHENS and JOSEPH CRAIG,

*Appellees.*

} No. 2500

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BRIEF OF APPELLANT.

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STATEMENT OF FACTS.

This is an appeal from a decree dismissing appellant's bill for want of jurisdiction.

(a) *Allegations of which the Court below took note.*—The allegations of the bill which were deemed

material by the court below present the following case:

On November 18, 1907, Central Counties Land Company, a corporation, was the owner of a certain 1120 acres of land in Lake County, California (Tr., p. 2).

On that day said corporation borrowed the sum of \$24,570.75 from defendant Capay Ditch Company, and executed therefor three promissory notes which aggregated the said sum (Tr., pp. 5-7).

As security for the payment of said notes, said Central Counties Land Company executed and delivered to said Capay Ditch Company a mortgage, in form a deed absolute (Tr., p. 7), which deed declared upon its face that it was "made, executed and delivered in pursuance of a resolution of the Board of Directors of said Central Counties Land Co." (Tr., p. 11).

Said resolution so referred to is set forth in the bill, and provides for the "*deposit as security for the payment of the notes* the deed of this corporation" (Tr., p. 12), and authorized the president and secretary to execute the "*deed as aforesaid . . . and to deposit the same as security for the payment of said notes*" (Tr., pp. 12, 13).

The title of the said Central Counties Land Company to the said lands is now vested in plaintiff (Tr., p. 20).

On December 18, 1911, the mortgagee Capay Ditch Company executed a purported conveyance of the

lands in question to the Yolo County Consolidated Water Company (Tr., p. 17).

Thereafter defendant Yolo County Consolidated Water Company executed a purported conveyance thereof to defendants Stephens and Craig (Tr. 17).

Thereafter on December 20, 1911, defendants Craig and Stephens executed a purported conveyance thereof to Yolo Water and Power Company (Tr., p. 18).

Defendant Adamson, a tenant of Central Counties Land Company, was at all times in possession of the property and has never to this day surrendered up the same, but while still retaining the possession which he obtained under appellants grantor, has attempted to attorn to defendant Yolo Water and Power Company (Tr., pp. 18, 19).

All of the appellees above named took their purported conveyances with actual knowledge and notice of the character of the transaction (Tr., pp. 15, 16).

The prayer is, that the deed of November 18, 1907, be adjudged a mortgage; that an accounting of rents, issues and profits be had; that plaintiff be permitted to redeem; for possession of the lands, and for general relief (Tr., pp. 25, 26).

The foregoing allegations of the Bill deal with the mortgaged premises.

(b) *Allegations apparently overlooked by Court below.*—But these are not the only allegations. There are other allegations which deal with other real prop-

erty belonging to plaintiff, and these other allegations appear to have been overlooked by the Court below. It is alleged that in addition to the mortgaged premises plaintiff is the owner and in possession of a large portion of the frontage of Clear Lake; that defendant Yolo Water and Power Company threatens to erect a dam on the mortgaged premises; that unless restrained, it will do so and will not only cause a considerable portion of the mortgaged premises to be flooded, *but also will cause all of the said lands of which plaintiff is the owner and in possession to be flooded* (Tr., pp. 24, 25).

An injunction is asked against the construction of the dam and to prevent the flooding of plaintiff's land (Tr., p. 26).

The Court below took no notice of these facts in passing upon the motion to dismiss, unless they are covered in the opinion by the following excerpt:

“A number of other averments of the complaint are omitted from this statement because they have no bearing upon the question to be determined at this time” (Tr., p. 34).

#### THE VIEWS OF THE COURT BELOW.

The learned Judge of the District Court discusses the question involved, in an opinion which will be found on pp. 32-35 of the Transcript. From this opinion it will be seen that he reached his conclusion that

the District Court was without jurisdiction for the reasons:

- (1) That the jurisdiction is to be determined by Sec. 24 of the Judicial Code which went into effect January 1, 1912;
- (2) That said section prohibits cognizance of suits by assignees of choses in action; and
- (3) That this suit is upon a chose in action. In this regard the Court says:

"It is strongly urged that this is not a suit upon a chose in action, but is a suit to quiet title. However the action may be denominated, it seems clear to me that what is sought here is *the enforcement of the original contract* between the Central Counties Land Company and the Capay Ditch Company, and the rights asserted are based wholly thereon.

"The Court is asked to declare the instrument in the form of deed to be a mortgage, *and to do this because the parties agreed that it was such*. If it were not for this agreement, plaintiff would have no cause of action against defendants. This agreement is a chose in action, and this suit being to recover upon it, falls within the terms of Section 24, above quoted, and cannot be maintained.

"The motion to dismiss will, therefore, be granted" (Tr., pp. 34-35).

We shall proceed respectfully to show that the Court below has in the foregoing passage fallen into an error which is readily demonstrable:

THE COURT ERRED IN ASSUMING THAT THE  
QUESTION OF JURISDICTION IS CONTROLLED  
BY SEC. 24 OF THE JUDICIAL CODE.

Section 24 of the Judicial Code (in effect January 1, 1912), declares that:

"No District Court shall have cognizance of any suit (except upon foreign bills of exchange) to recover on any promissory note or other chose in action in favor of any assignee . . . unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made."

The language of this act is not quite the same as that of the Act of 1887. The difference consists in this: (1) The earlier act says "to recover the *contents* of any promissory note or other chose in action," where the later act merely says "to recover on any promissory note or other chose in action"; and (2) The earlier act says "to recover *the said contents*," where the latter says "to recover upon said note or other chose in action."

We insist that these two acts employ the phrases "contents of a chose in action" and "chose in action" in the same sense and that the later statute is intended to be but a codification of the awkwardly expressed earlier act. It had been pointed out more than once by the United States Supreme Court that the words employed in the earlier acts "were not happily chosen" (*Shoecraft v. Bloxham*, 124 U. S., 735; *Plant Inv. Co. v. Jacksonville, etc. Ry. Co.*, 152 U. S., 76), and in codifying the act the changes were conse-

quently made, but were obviously not intended, we think, to alter the meaning, for the Judicial Code itself so declares in Sec. 294:

"Sec. 294. The provisions of this Act, so far as they are substantially the same as existing statutes, shall be construed as continuations thereof, and not as new enactments, and there shall be no implication of a change of intent by reason of a change of words in such statute, unless such change of intent shall be clearly manifest."

If we are right in this contention then the error of the Court in treating the case as governed by the later act is of no material consequence. But if this phrase as used in the latest enactment has a broader meaning than as used in the earlier,—if it includes choses in action not contemplated by the latter,—then the error is of very considerable consequence; for the adjudged cases have given a fixed meaning to the phrase "*contents of a chose in action*" as used in the act of 1887-8, which, as we shall presently show, is conclusively favorable to appellant's contentions. Hence the discussion under this head is pertinent; for it will be noted that the mortgage, in form a deed which the Central Counties Land Company passed to defendant Capay Ditch Company, was executed on the 18th day of November, 1907; also that the purported conveyances of the mortgaged premises to the other defendants all took place in December, 1911. The cause of action, therefore, had accrued prior to January 1st, 1912, on which date the present section of the Judicial Code by its terms went into effect. The point is, that the

following clause found in the present act preserves the former act so far as plaintiff's right of action is concerned:

"The repeal of existing laws . . . embraced in this act shall not affect . . . any right accruing or accrued or any suit or proceeding . . . But all such suits and proceedings for causes arising or acts done prior to such date may be commenced . . . within the same time and with the same effect as if said repeal . . . had not been made."

*Judicial Code, Sec. 299.*

Interpreting the foregoing clause, the Federal Courts have said:

"This section saves to the Federal Courts jurisdiction, not only of pending actions, but of causes of action which accrued prior to January 1st, 1912. *Lincoln v. Robinson* (D. C.), 194 Fed., 571; *Taylor v. Midland Valley R. Co.* (D. C.), 197 Fed., 323; *Dallyn v. Brady* (D. C.), 197 Fed., 494."

*M'Kernan v. North River Ins. Co.*, 206 Fed., 984, 987.

"What is now insisted upon by the motion to remand is, in effect, that the words 'causes arising or acts done prior to such date' shall be entirely eliminated, for no other effect can be given to these words except that causes which arose prior to January 1, 1912, although not yet sued on, still remain within the jurisdiction of the national courts, as if no change in the law had been made. If the intention of Congress by the enactment of § 299 had been merely to save suits then pending, is it not reasonable to suppose that similar language would have been used as in subdivision 20 of section 24, and the words 'shall not affect any right accruing or accrued,' and again, 'any act done or right accruing

or accrued before the taking effect of this act,' found in § 299, omitted?"

*Wells v. Russellville, etc. Co.*, 206 Fed., 528, 533.

See to like effect:

*Dallyn v. Brady*, 197 Fed., 494;  
*M. K. & T. Ry. Co. v. Chappell*, 206 Fed., 688, 697;  
*Cady v. Barnes*, 208 Fed., 361.

We conclude, therefore, that since the cause of action in the case at bar arose prior to January 1, 1912, the learned Judge was in error in holding that the question of jurisdiction is not to be measured by the phrase "*contents of a chose in action*" as used in the earlier act.

**THE SUIT IS FOUNDED UPON THE TITLE TO REAL PROPERTY, AND THE COURT ERRED IN HOLDING THAT IT WAS BASED UPON A CHOSE IN ACTION.**

The other error found in the opinion of the Court below is readily demonstrable:

(a) It is clear that a suit founded upon a conveyance of a title to land is not a suit by an assignee to "recover the contents of a chose in action," within the meaning of the Act of 1887-8.

"The contents of a contract as a chose in action in the sense of section 629 are the rights created by *it* in favor of

a party in whose behalf *stipulations are made in it* which he has a right to enforce in a suit founded *on the contract*; . . . the obligation or promise contained in a contract is the contents when a suit is brought to enforce such obligation."

*Corbin v. County of Black Hawk*, 105 U. S., 659, 665-6.

A deed possesses none of these elements. It conveys the title. The grantee sues a third person to protect that title. His right arises from his title. It is not based on any contract with the third person.

This distinction was early recognized by the United States Supreme Court. In a case where the law was such that the title to lands was passed to the mortgagee by the mortgage and the mortgagee sued a third person in ejectment, it was held that since plaintiff had the title, that was enough so far as the jurisdiction was concerned (*Smith v. Kernochan*, 7 How. (U. S.), 216).

Citing this last case as authority, the same Court said in *Deshler v. Dodge*, 16 How. (U. S.), 631:

"The distinction, as it respects the application of the 11th section of the judiciary act to a suit concerning a *chattel in action*, is this—where the suit is brought to enforce the contract, the assignee is disabled unless it might have been brought in the court, if no assignment had been made; but, if brought for a tortious taking or wrongful detention of the chattel, then the remedy accrues to the person who has the right of property or of possession at the time, the same as in case of a like wrong in respect to any other sort of personal chattel.

"The principle governing the case will be found in cases that have frequently been before us arising out of the assignment of mortgages, where it has been held, if the suit

is brought to recover the possession of the mortgaged premises, the assignee may bring the suit in the federal courts, if a citizen of a State other than that of the tenant in possession, whether the mortgagee could have maintained it or not, within this section; but, if brought to enforce the payment or collection of the debt by sale of the premises or by a decree against the mortgagor, then the assignee is disabled, unless the like suit could have been maintained by the mortgagee. 7 How., 198. This distinction is stated by Mr. Justice Grier, in the case of *Sheldon, et al. v. Sill*, 8 How., 441."

*Deshler v. Dodge, supra.*

"Upon the first question, it may be observed that the denial of jurisdiction of suits by assignees has never been taken in an absolutely literal sense. . . . It has also been determined that the assignee of a *chose in action* may maintain a suit in the Circuit Court to recover possession of the specific thing, or damages for its wrongful caption or detention, though the court would have no jurisdiction of the suit if brought by the assignors. And it has recently been very strongly argued that the restriction applies only to contracts 'which may be properly said to have contents'; 'not mere naked rights of action founded on some wrongful act, some neglect of duty to which the law attaches damages, but rights of action founded on contracts which contain within themselves some promise or duty to be performed.'

"*And this view of the restriction seems to be warranted by the consideration of the mischief which it was intended to prevent.*"

*Bushnell v. Kennedy*, 9 Wall., 387, 391-2.

(b) Repeated decisions have excluded any possible idea that the rights created by the conveyance of an estate in land is to be deemed a chose in action.

Thus, in *Briggs v. French*, 4 Fed. Cas., 119, it is said:

"Now, the exception extends to promissory notes and choses in action. The present suit is not founded upon

either. It is founded upon a conveyance of a title to land, good (as far as appears) by the *lex loci situs* . . . . The words, then, of the exception do not apply to the case. It is a case within the general descriptive words as to suitors, founding the jurisdiction of the circuit court."

Similarly, it was said in *Sheldon v. Sill*, 8 How. (U. S.), 449, 450:

"The only remaining inquiry is, whether the complainant in this case is the assignee of a 'chose in action' within the meaning of the statute. The term 'chose in action' is one of comprehensive import.

" . . . It is true, *a deed of title for land does not come within this description.*"

In a case arising in Ohio, where the title passes under a mortgage, the Court said:

"A conveyance of land is not a chose in action.

" . . . That the statute acts upon negotiable paper is clear. . . . That it does not act on conveyances of real estate, either equitably or legally, would seem to be undoubted."

*Dundas v. Bowler*, 8 Fed. Cas., 28.

"The conveyance by the marshal under the receivership proceedings . . . can hardly be considered merely as an assignment of the original contract under which the plant was erected. *It was a conveyance of real estate.* . . . . There does not seem to be any likeness in the case to that of the assignee of a promissory note or other chose in action."

*Portage City Water Co. v. City of Portage*,  
102 Fed., 769, 774.

In a case arising in this Circuit it was said:

"It is now objected that the plaintiff is simply the assignee of a contract or contracts for the title to, or interest

in, real property; and, as it does not appear that all the assignors could have maintained this suit on the ground of their citizenship, he cannot do so. . . .

" . . . the bill alleges that since May 4, 1874, the plaintiff Gest, 'by a regular chain of conveyances and assignments,' has acquired 'all the right, title, and interest' which Rice and Clark, Layton & Co. then had in said property, or the rents, issues and profits thereof. This being so, he is the owner of the property in equity, subject to the lease made to Carter and Packwood. The legal title was wrongfully obtained by the latter after their sale to Rice, and they hold the same in trust for their vendee. A sale and conveyance of the property to Gest under such circumstances, or of all the right, title and interest of Rice and Clark, Layton & Co. therein, *is the sale and conveyance of the beneficial interest in the property, and not the mere assignment of a right of action thereabout.*"

*Gest v. Packwood, 39 Fed., 525, 537.*

We thus have early declarations, both by the United States Supreme Court and by the United States Circuit Courts, to the effect that actions founded upon conveyances of land are not suits to recover upon a chose in action within the meaning of said acts. Indeed, no one seems ever before to have doubted it. The Federal Courts have taken jurisdiction of hundreds of suits brought by grantees under deeds in which the grantor could never have maintained the suit if the conveyance to him of the title was to be regarded as a chose in action, or if he himself were to be regarded as the assignee of a chose in action. In many of these cases the question of jurisdiction was directly raised, the ground assigned being that the conveyance was merely colorable and that it did not therefore in reality transfer the title. It has been re-

peatedly held by the Courts that if the title really passed by the conveyance, then if the requisite citizenship existed, the Federal Courts would have jurisdiction although they would not have had jurisdiction had the title remained in the grantor.

The following authorities will sufficiently illustrate this proposition:

"The bill states the complainant to be a citizen and resident of the State of Alabama, and the defendants to be citizens and residents of the State of Ohio. It has not been alleged, and certainly cannot be alleged, that a citizen of one State having title to lands in another, is disabled from suing for those lands in the courts of the United States, by the fact that he derives his title from a citizen of the State in which the lands lie; consequently, the single inquiry must be whether the conveyance from M'Arthur to M'Donald was real or fictitious?"

*M'Donald v. Smalley*, 1 Peters, 623.

"The subject of colorable transfers to create a case for the jurisdiction of the courts of the United States was presented for the most part in suits for the recovery of real property, when a conveyance had been made by a citizen of the State in which the suit must be brought to a citizen of another State. . . . And upon the question of transfer it was uniformly held that, *if the transaction was real and actually conveyed to the assignee or grantee all the title and interest of the assignor or grantor in the thing assigned or granted*, it was a matter of no importance that the assignee or the grantee could sue in the courts of the United States when his assignor or grantor could not."

*Farmington v. Pillsbury*, 114 U. S., 138, 143.

See also *Lehigh Mining & Mfg. Co. v. Kelley*, 160 U. S., 327, where many cases are reviewed.

There can be no doubt, therefore, that if, as appell-

lant alleges and the demurrer admits, the Central Counties Land Company formerly owned these lands, and its title thereto has become vested in plaintiff by mesne conveyances, plaintiff is entitled to bring an action in the Federal Courts to remove any cloud that may exist upon its title. It happens here that the cloud is a mortgage. The fact that the mortgage took the form of a deed absolute, does not affect the case unless it be to make the cloud a more serious one. The suit is not brought upon an agreement that no title should pass to the mortgagee. *It is brought, because by mandate of express law, no title did or could pass to the mortgagee under the circumstances.*

That this action, under the system prevailing in California, is to be treated as a suit to remove a cloud from title will be further emphasized a little later on in this brief. First we wish to point out that:

(c.) **The learned court below misconceived the nature of the action.**

As we have seen in the paragraph already quoted herein from his opinion, the learned Judge of the District Court conceived that the appellant seeks "the enforcement of the original contract" between the mortgagor and the mortgagee; and that "the Court is asked to declare the instrument in form a deed to be a mortgage . . . because the parties agreed it was such."

With much respect, we submit that this is an entire misconception of appellant's case.

The learned trial Judge seems to have overlooked the fact that in all mortgages words are used which, but for the *law*, would pass the title. Their *form* is that of a conveyance. Prior to the statute the identical language now ordinarily used passed the title (*Savings & Loan Society v. McKoon*, 120 Cal., 179).

But whenever the fact appears that the instrument is given merely as security, *the law*—not the agreement of the parties—steps in and cuts down *the meaning of the terms used*, and prevents them from carrying the estate which the terms of the instrument would otherwise carry. *And there is no difference whatever in this respect whether the mortgage is in the usual form or in the form of a deed absolute* (*Brandt v. Thompson*, 91 Cal., 461).

The bill alleges certain facts, viz.:

- (1) The borrowing of the money from Capay Ditch Company and the giving of promissory notes therefor (Tr., pp. 5-7); and
- (2) The contemporaneous execution by the Central Counties Land Company, "solely for the purpose of securing the payment of said promissory notes," of an instrument in writing in form a deed, but intended as a mortgage (Tr., p. 7).

*There is no allegation anywhere in the bill that the parties ever agreed that the instrument should be a*

*mortgage.* The learned Judge is wholly in error in this particular. The allegation is, that the Central Counties Land Company, solely for the purpose of securing the notes, executed a deed in form but intended as a mortgage. There is no allegation that defendant agreed that it should be such. The essential allegation is that the deed was given solely for the purpose of securing the notes. The law would then stamp it as a mortgage, whether so intended or not.

The theory of the complaint is this:

The Civil Code of California declares:

"Sec. 2924. Every transfer of an interest in property other than in trust, made only as security for the performance of another act, is to be deemed a mortgage."

As already pointed out, the deed here in question is alleged to have been executed "solely for the purpose of securing the payment of the notes." It is therefore "to be deemed a mortgage."

The Supreme Court of California, construing the said section, has said:

"If the deed was intended merely as a security for the payment of a debt, *it is a mortgage, 'no matter how strong the language of the deed or any instrument accompanying it might be.'* (*Woods v. Jansen*, 130 Cal., 200)."

*Todd v. Todd*, 164 Cal., 255.

See also:

*Moisant v. McPhee*, 92 Cal., 76;

*Smith v. Smith*, 80 Cal., 325.

Whenever the fact is that a deed absolute is given merely as security for a debt, the law fixes its character, and *the policy of the law is such that it will not permit the parties to contract that any title shall pass by the instrument.* This is not only clear from the foregoing quotation but the Civil Code expressly declares that:

*"Sec. 2888. Notwithstanding an agreement to the contrary, a lien, or a contract for a lien, transfers no title to the property subject to the lien."*

And the Code of Civil Procedure contains the following provision:

*"Sec. 744. A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale."*

The effect of sections 2924 and 2888 of the Civil Code, as regards the passage of title is summed up in the following quotation:

*"It cannot be doubted that the deed to the bank was simply a mortgage and vested it with nothing more than a mortgage lien. 'Every transfer of an interest in property, other than in trust, made only as security for the performance of another act, is to be deemed a mortgage,' except in cases of pledges of personal property. Section 2924, Civil Code. 'Notwithstanding an agreement to the contrary, a lien, or a contract for a lien, transfers no title to the property subject to the lien.' Section 2888, Civil Code."*

*Shirey v. All Night and Day Bank, 166 Cal., 50, 54.*

The foregoing discussion has brought us to see that however strong the terms of the deed may be thought to be, no title passed thereunder to the grantee named therein. The only operative effect of the instrument was to create a lien. It is alleged as a fact that the instrument was executed solely as security for the notes—and indeed, the very resolution which authorized the President and Secretary to execute the deed is set forth in the bill, and this shows that they were to execute the instrument merely as security for the notes. From these allegations it follows as a matter, *not of contract but of law*, that no title passed by the deed. Upon this state of facts the law fixed the rights of the parties. If notwithstanding the existence of said facts, the parties had tried to agree that title should nevertheless pass, the agreement would have been void—and neither an action nor a defense could be grounded upon it.

The law gave the plaintiff all the rights it has. Even if the grantee named had expressly agreed that the grantor should have a right to a reconveyance, that would have added no new right or obligation that the law did not already impose.

*Breitenbücher v. Oppenheim*, 160 Cal., 98, 102; *Bayles v. Baxter*, 22 Cal., 575, 578-9.

The learned Judge mistakenly says that “the Court is asked to declare the deed to be a mortgage because the parties have agreed that it should be a mortgage”;

while the fact is that the bill asks that the deed be adjudged a mortgage because the law makes it a mortgage. It alleges that the borrowing corporation authorized its President and Secretary to execute this deed as security for the notes and that the instrument was delivered solely for that purpose. Upon these facts the law gives to the instrument its character as a mortgage—and it makes not the least difference what the mortgagee may have thought about it. If he agreed that it was a mortgage (the bill contains no such allegation), he merely agreed to what the law had already declared the instrument to be.

If, on the contrary, both parties had agreed that although security for the loan, it should be a deed and convey the title, such agreement would have been void and would not have altered the character of the transaction (see Civil Code, Sec. 2889), and it would have been a mortgage nevertheless.

**THIS ACTION IS TO BE DEEMED AN ACTION TO REMOVE A CLOUD FROM TITLE, NOT TO RECOVER ON A CHOSE IN ACTION.**

In the case at bar all of the promissory notes secured by the deed, were dated November 12, 1907, and were due and payable August 1, 1908. The lien created by the deed was therefore extinguished four years later; that is to say, on August 1, 1912, by lapse

of time. This results from Sec. 2911 of the Civil Code, which declares:

"Sec. 2911. A lien is extinguished by the lapse of time within which under the provisions of the Code of Civil Procedure an action can be brought upon the principal obligation."

In *Raynor v. Drew*, 72 Cal., 308, a case identical with the case at bar was presented. The action was brought pursuant to section 346 of the Code of Civil Procedure to "redeem" a mortgage. The Court said:

"On May 14, 1875, the plaintiff gave to the defendant an instrument in writing, which in form was an absolute deed. It is admitted by the pleading that this instrument was to secure the payment of a promissory note; and therefore it was a mortgage, and under the present doctrine, did not convey the title (*Taylor v. McLain*, 64 Cal., 514; *Healy v. O'Brien*, 66 Cal., 519), and did not give a right of possession. (Civ. Code, sec. 2927.)"

" . . . If the title and right of possession remain in the mortgagor, and the lien of the mortgage is extinguished by lapse of time (Civ. Code, sec. 2911), what is it that the mortgagee has which can be redeemed? The old phraseology has come down to us, and found a place in the statute. But it is manifest that an action to 'redeem' under these circumstances is in effect under our system merely an action to remove a cloud. And since a court of equity may require justice to be done as a condition of removing the cloud, why should there be any period of limitation for such an action?"

In *Baker v. Fireman's Fund Ins. Co.*, 79 Cal., 34, 42, the Court uses this language:

"As said heretofore by the Appellate Court, this action to redeem is in effect merely an action to remove a cloud from the title."

*Hall v. Arnott*, 80 Cal., 348, 354, also presents a case where a deed absolute in form was given as security and the statute of limitations had run on the debt. The Court expressed itself as follows:

"The lien created by the instrument having been thus nullified and extinguished, and the leading title and right of possession having remained in the mortgagor, it may be said that there is nothing to redeem. But the instrument, being a deed absolute in form, constitutes a cloud upon whatever interest the grantor may have had in the property therein described at the time it was executed, or that he or his successors in interest may have subsequently acquired. The plaintiff is in equity entitled to have such cloud removed upon doing equity, in paying the remainder due upon the decree of foreclosure in *Arnot v. Waterhouse*. (*Raynor v. Drew, supra*; and *Booth v. Hoskins, supra*; *Cazara v. Orena*, 80 Cal., 132.)"

These authorities, we submit, make it clear beyond doubt that this action to redeem is not to be classed with suits to recover upon a chose in action. This suit is grounded upon plaintiff's title. The defendant once had a lien on the real property which has become extinguished by lapse of time. That lien was created by an instrument in form a deed absolute, and it constitutes a cloud upon plaintiff's title.

#### THE INSTRUMENT IS ON ITS FACE A MORTGAGE.

While we think further discussion unnecessary, there is another fact which perhaps should be brought to the Court's attention. Thus far we have assumed that the instrument is upon its face a deed. But this concedes too much. In form, the instrument is that

of a grant, bargain and sale deed, until we come to the paragraph which precedes the witness clause. This declares that it is "made, executed and delivered in pursuance of a resolution of the Board of Directors of the Central Counties Land Company." The act is the act of a corporation—not of a private individual. Express reference is made to the resolution in the deed, and said resolution is thereby incorporated into the instrument, and this shows on its face that the deed was to be given as security only.

Anyone in taking such an instrument from the corporation, even where the resolution is not expressly referred to, is bound to look to the authority of the officers who sign the instrument (*Vaca Valley R. R. Co. v. Mansfield*, 84 Cal., 566).

We have, therefore, a case where the instrument and the resolution referred to in the instrument must be read together, and when we do this, we have a mortgage—not because parol evidence *dehors* the instrument establishes it to be such, but because the fact appears from the two instruments when read together.

Viewed from this standpoint, the action comes to this: Appellant owns the property. There is an outstanding mortgage on it, the lien of which has been extinguished by lapse of time, and he sues to remove the mortgage as a cloud upon his title, offering to do equity by paying whatever is unpaid on the mortgage,

regardless of the statute of limitations. Such suit cannot, of course, be said to be brought by an assignee to recover upon a chose in action.

**THE JURISDICTION ATTACHES REGARDLESS OF  
THE MORTGAGE QUESTION, BECAUSE OF  
OTHER INDEPENDENT ALLEGATIONS IN THE  
BILL.**

There is yet another reason for a reversal of the decree appealed from.

As pointed out in the statement of facts with which this discussion is opened, the bill here contains the following allegations:

**XXV**

"That the defendant Yolo Water and Power Company threatens to and will, unless restrained by this Honorable Court, proceed to construct, and will construct, a dam upon the real property hereinabove described, and will construct controlling works thereon, and will cause a considerable portion of the said lands to be flooded.

**XXVI**

"That plaintiff is the owner and in possession of a large portion of the frontage of said Clear Lake, and that if such dam is built the waters of said lake will thereby be raised and impounded, and all of the lands of plaintiff along said lake frontage will be flooded" (Tr., pp. 24, 25).

These allegations are coupled with a prayer that the defendant "be restrained and forever enjoined "from erecting or constructing any dam, or portion "of a dam, or flumes, or ditches or controlling works, "upon the said real property described in this Bill,

"or upon any part or portion thereof, or from flooding any part or portion of the said lands, or any other lands belonging to plaintiff" (Tr., pp. 25-26).

These allegations present the case of an owner of a large amount of real property, some of which is mortgaged, suing to enjoin the erection of a dam upon the mortgaged premises and the flooding of the said mortgaged premises and other lands belonging to the mortgagee. This in itself, together with the allegations of diverse citizenship, brings the case within the Federal jurisdiction.

But this is not all. The bill further alleges that defendant Adamson was the tenant of plaintiff's predecessor in interest; that he has never surrendered up the possession of the mortgaged premises; that he has attempted to attorn to the defendant Yolo Water and Power Company, and now claims to be in possession of the property as the tenant of the said defendant Yolo Water and Power Company and claims to have paid the rental to said defendant (Tr., pp. 18, 19 and 20).

Plaintiff prays to be let into the possession of the property; an accounting is asked, and general relief also is prayed for. These allegations also, we submit, make out a case within the jurisdiction.

So on that ground also the jurisdiction should have been retained.

It is to be noted that if the District Court has jurisdiction to accord preventive relief to protect plaintiff's other lands and to prevent waste or injury to the mortgaged premises, the controversy will draw to it the matter of the redemption from the mortgage, even if the latter standing alone would not come within the jurisdiction. This is pointed out in *Howe & Davidson v. Haugan*, 140 Fed., 182, 184, where the following is said:

"The remaining ground of objection is that the court is without jurisdiction 'in respect to any of the water leases or contracts except the one option contract made directly with the complainant.' This objection rests upon the statutory limitation against suit by the assignee of a *chose in action* for its enforcement unless suable as well by the assignor in the Federal court, and upon the authorities holding bills for specific performance of contracts to be within such limitation. If it be assumed, however, that the rights derived through Mr. Clark are *choses in action*, and cannot confer jurisdiction, nevertheless the presentation of the jurisdictional cause—as thus rightly conceded to appear—*would have the right to Federal jurisdiction, and bring within equitable cognizance all the other matters referred to as branches of the controversy, saving multiplicity of suits. The statute is not then applicable when jurisdiction attaches for such cause well stated.*"

This, of course, is but an application of a general principle (*Pomeroy's Equity Jurisprudence*, Vol. I, Sec. 181).

For each and all of the foregoing reasons appellant respectfully submits that the decree dismissing the bill

for want of jurisdiction was erroneous and should be reversed.

CHARLES S. WHEELER and  
JOHN F. BOWIE,  
Attorneys for Plaintiff and Appellant.

HARDING & MONROE,  
Of Counsel.



No. 2500

IN THE

United States Circuit Court of Appeals  
For the Ninth Circuit

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POWER AND IRRIGATION COMPANY OF CLEAR  
LAKE (a corporation),

*Appellant,*

vs.

CAPAY DITCH COMPANY (a corporation),  
YOLO COUNTY CONSOLIDATED WATER COM-  
PANY (a corporation), J. M. ADAMSON,  
L. D. STEPHENS and JOSEPH CRAIG,

*Appellees.*

**BRIEF FOR APPELLEES.**

---

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MAR 10 1915

Filed this..... day of March, 1915.

F. D. MONCKTON,

FRANK D. MONCKTON, Clerk.

By ..... Deputy Clerk.



No. 2500

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**BRIEF FOR APPELLEES.**

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**Statement of Facts.**

No more able summary of the facts of this case can be obtained than that contained in the opinion of the Judge of the District Court, rendered at the time of the order dismissing the bill.

The facts, as there stated, are as follows:

“The complaint avers that the Central Counties Land Company, a corporation, organized under the laws of the State of California, was on November 18th, 1907, the owner of certain lands in Lake County, and on that day bor-

rowed from defendant Capay Ditch Company three several sums of money, \$5,625.00, \$8,320.75 and \$10,625.00, and executed and delivered to said ditch company its three several promissory notes for the said amounts all payable on or before August 1st, 1908. That contemporaneously, and as a part of the same transaction, and solely for the purpose of securing the payment of said notes, the said Central Counties Land Company executed and delivered to said ditch company an instrument in writing, in form a grant, bargain and sale deed, but intended as a mortgage, conveying to said ditch company the said lands in Lake County; that on December 18th, 1911, the said ditch company conveyed said lands to defendant Yolo County Consolidated Water Company, which company thereafter conveyed the said lands to defendants, L. D. Stephens and Joseph Craig, who in turn conveyed the same to defendant Yolo Water and Power Company, and that each and all of the defendants named took said conveyances with full knowledge of the real nature of the original deed from the Central Counties Land Company to the Capay Ditch Company; that plaintiff is the successor in interest of said Central Counties Land Company, and all of the title of said lands, has, by mesne conveyances, become and is now vested in plaintiff, and that all of the demands of said Central Counties Land Company against the defendants have been transferred to plaintiff.

“This action seeks to have the deed to the Capay Ditch Company adjudicated a mortgage, and that leave be granted plaintiff to redeem said land by paying whatever is found to be due such defendants as may be entitled to it. Possession of the land is also sought, as well as an accounting of the rents, issues, and profits thereof. It is further asked that a receiver be appointed to take charge of said lands and pre-

serve the same, and that defendant Yolo Water & Power Company be enjoined from doing certain contemplated work thereon. A number of other averments of the complaint are omitted from this statement, because they have no bearing upon the question to be determined at this time."

The situation presented in 1913 was briefly this: The Central Counties Land Company, a *California corporation*, hereinafter referred to as the Land Company, had borrowed certain money from the Capay Ditch Company, a *California corporation*, hereinafter referred to as the Ditch Company, and for the purpose of securing the payment of this loan, had mortgaged to the Ditch Company certain land belonging to the Land Company. The Power and Irrigation Company of Clear Lake, appellant herein, was organized as an *Arizona corporation*, April 9, 1913. The Land Company *assigned its equity of redemption* to the appellant, plaintiff below, and on April 25, 1913, said plaintiff instituted this action whereby it seeks to have the deed to the Ditch Company adjudged a mortgage and that it be granted leave to redeem said land on repayment of the loan.

It will be noticed that the lower Court also states, in its summary above referred to, that "a number of other averments of the complaint are omitted from this statement, because they have no bearing upon the question to be determined at this time". Referring to page 3 of appellant's brief, under the caption "Allegations apparently

overlooked by the Court below" we find these "other averments" are as follows: That the plaintiff is the owner, in addition to the mortgaged property, of certain other land on Clear Lake and that the defendant Yolo Power and Water Company, an alleged grantee of the mortgaged premises with notice of the mortgage, threatens to erect a dam on said premises, thereby causing said premises and the other land belonging to the plaintiff to be flooded. Accordingly plaintiff seeks an injunction restraining the defendant Yolo Power and Water Company from the erection of said dam.

In passing on the question of the Court's jurisdiction to entertain this bill to redeem, the lower Court very properly ignored this part of the bill. The question presented was—has this plaintiff the right to maintain this action to redeem in the Federal Courts, when the Land Company, its assignor, could not so maintain it. The fact that as *ancillary and subordinate to* this bill to redeem, the plaintiff also seeks an injunction, can in no wise alter the question of jurisdiction. The question of jurisdiction depends simply and solely on the facts constituting the basic cause of action. The lower Court held, and we think this decision proper beyond all question, that the plaintiff, as assignee of an equity of redemption, had no standing to prosecute this action because of the express inhibition of Section 24 of the Judicial Code. The determination of this question is unquestionably unaffected by the pres-

ence of an allegation and prayer for ancillary relief by way of injunction.

At this point we desire to call the attention of this Court to the fact that this case is substantially the same as the case of *Power and Irrigation Company of Clear Lake v. L. D. Stephens et al.*, No. 2501. In that case, the plaintiff's assignor borrowed money from the defendant Stephens with which to purchase land, and *had the vendor convey the land to Stephens* as security for the loan. That transaction constituted a mortgage equally with the transaction in the case at bar. The discussion in appellee's brief in that case as to the nature of the "chase in action"—as one arising from contract, not from tort, and therefore a "chase in action" within the meaning of the statute, is applicable here.

### Argument on the Law.

#### I.

##### **THE APPELLANT'S FIRST CONTENTION IS THAT THE LOWER COURT ERRED IN DECIDING THAT THE QUESTION OF JURISDICTION IS CONTROLLED BY SECTION 24 OF THE JUDICIAL CODE.**

It will be remembered that the early Acts of 1789 and 1887-8 declared (for the purposes of this case) that an assignee who sought "to recover *the contents* of a chase in action" must show that his assignor could have maintained the action. The Judicial Code of 1912, however, declares that the

assignee must show that his assignor could have brought an action "to recover upon a chose in action".

The appellant, confronted by this pronounced change in an act which has long withstood adverse criticism, maintains that this change was obviously not intended to alter the meaning, and points to Section 294 of the Judicial Code which reads as follows:

"Sec. 294. The provisions of this Act, so far as they are substantially the same as existing statutes, shall be construed as continuations thereof, and not as new enactments, and there shall be no implication of a change of intent by reason of a change of words in such statute, unless such change of intent shall be clearly manifest."

Appellees, in reply to this position, submit that the change in the language comes within the exception embodied in Section 294, to wit: "unless such change of intent shall be clearly manifest".

It should be remembered that the language employed in the Judiciary Act of 1789 and the Acts of 1887-8—"to recover the contents of a chose in action" has undergone the scrutiny of the Federal Courts for over a century. Despite this opportunity for judicial interpretation prescribing the precise limitations of this clause, the Courts have failed to entirely agree on such limitations.

In the case of *Shoecraft v. Bloxham*, 124 U. S. 730; 31 L. ed. 574, decided in 1888, in an opinion written by Justice Field, he had occasion to apply

the statute to an action to enforce the specific performance of a contract, Justice Field declared:

“The terms used, ‘the contents of any promissory note or other chose in action,’ were designed to embrace the rights the instrument conferred which were capable of enforcement by suit. *They were not happily chosen to convey this meaning*, but they have received a construction substantially to that purport in repeated decisions of this Court.”

We have italicized a portion of this extract to show the Court’s dissatisfaction over the awkwardness of the language employed to declare the obvious meaning of the statute. We have here an opinion which *anticipates* and *calls for* the language now found in the Judicial Code of 1912. The scope of the acts preceding that of 1912, as distinguished from the scope of the present act, cannot be better expressed than by employing the language used by the lower Court in its opinion in the companion case of *Power and Irrigation Company of Clear Lake v. Bank of Woodland et al.*, No. 2499 (Tr. p. 35) where he says:

“It must be remembered that we are not dealing with the words ‘contents of a chose in action,’ which would imply a subsisting contract having the contents capable of recovery.”

In other words this act as modified, is knowingly designed and intended to give the term “chose in action” a wider and more comprehensive scope than it has hitherto enjoyed, to form a basis for harmonizing the conflicting decisions, if any there be, con-

struing the preceding acts, and with the single limitation that the chose in action must not arise out of a tort, to embrace all choses or rights of action, founded on, depending upon or arising out of contract.

Appellant further advances the proposition that the lower Court, in determining the question of jurisdiction in this case, must apply the act in force prior to 1912. Appellant reasons that as the Land Company mortgaged its land to the Ditch Company prior to 1912, the cause of action to redeem accrued at that time, and that Section 299 of the Judicial Code preserves to plaintiff, *who acquired no rights until the assignment by the Land Company in 1913*, the right to be governed by the former act. When we consider that what we are to determine is the *right of the plaintiff in this action to maintain this action*, and consider that the plaintiff *did not become a party to this action by assignment* until after the Judicial Act of 1912 went into effect, it is perfectly clear that the question of jurisdiction is controlled by Section 24 of the Judicial Code alone.

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## II.

### **THE APPELLANT NEXT MAINTAINS THAT THE SUIT IS FOUNDED UPON THE TITLE TO REAL PROPERTY AND NOT UPON A CHOSE IN ACTION.**

The appellant, as was its course in the companion case, *Power and Irrigation Co. of Clear*

*Lake v. Stephens et al.*, No. 2501, again seeks refuge under the language of its complaint describing the transaction by which the Land Company invested it with the right to institute this action. The complaint reads:

“That by mesne conveyances from said board of trustees, all of the title to said real property hereinabove described become and is now vested in the plaintiff, and plaintiff is the lawful owner thereof as successor in interest of said Central Counties Land Company.” (Tr. p. 20.)

In short appellant maintains that this action is founded *on a conveyance of a title to land* and as such is not a suit to “recover upon a chose in action”. Appellant maintains that the Land Company conveyed to it the title to the land, that it is suing the Ditch Company, appellee herein, to protect that title, that its rights arise from that title and that its rights are not based on any contract with the Ditch Company. In other words, appellant maintains that the Ditch Company did not obtain the land from the Land Company by way of a *contract* of mortgage, that the Land Company did not convey the legal title to the Ditch Company by deed absolute under the *express contract* that it was simply to be held by the Ditch Company as security for the latter’s loan; but that the Ditch Company by a *tortious taking* obtained the land, that the Land Company conveyed the land to appellant and that the appellant is now suing the Ditch Company to recover the possession of said land in an action sounding in tort, not in contract.

Appellant relies on the cases of *Deshler v. Dodge*, 16 How. 631; 14 L. ed. 1084, and *Smith v. Kernochan*, 7 How. 216; 12 L. ed. 198.

In *Deshler v. Dodge*, supra, we have this language:

“The principle governing the case will be found in cases that have frequently been before us arising out of the assignment of mortgages, where it has been held, if the suit is brought to recover the possession of the mortgaged premises, the assignee may bring the suit in the federal courts, if a citizen of a State other than that of the tenant in possession, whether the mortgagee could have maintained it or not, within this section; but, if brought to enforce the payment or collection of the debt by sale of the premises or by a decree against the mortgagor, then the assignee is disabled, unless the like suit could have been maintained by the mortgage. 7 How. 198.”

Turning to the case of *Smith v. Kernochan*, supra, the authority on which the above statement is made, we find that it affords absolutely no foundation for the italicized portion of said statement. In *Smith v. Kernochan* a mortgagee had assigned his right to foreclose, or more properly speaking, had conveyed to a grantee his legal title, for the case arose in a jurisdiction where the mortgagee took legal title. The assignee or grantee sued the mortgagor in ejectment (the mortgage having previously been declared void in an action brought by the mortgagee himself).

The right of the assignee or grantee to maintain the action was not raised by *plea in abatement* and

on this ground, and on this ground alone, was the assignee or grantee allowed to proceed. The Court said:

“The true and only ground of objection in all these cases is, that the assignor, or grantor, as the case may be, is the real party in the suit, and the plaintiff on the record but nominal and colorable, his name being used merely for the purpose of jurisdiction. The suit is then in fact a controversy between the former and the defendants *notwithstanding the conveyance*; and if both parties are citizens of the same State, jurisdiction of course cannot be upheld. (1 Peters 625; 2 Dallas 381; 4 lb. 330; 1 Wash. C. C. 70, 80; 2 Sumner 251.)

“Assuming, therefore, everything imputed to the assignment of the mortgage from the company to the plaintiff, the charge of the court was correct. *The objection came too late, after the general issue. For when taken to the jurisdiction on the ground of citizenship, it must be taken by a plea in abatement, and cannot be raised in the trial on the merits.* (D. Wolf v. Rabaud, 1 Peters 417; Evans v. Gee, 11 id. 80; Sims v. Hundley, 6 How. 1).”

The Court acknowledged that had the objection to jurisdiction been properly raised, the assignee would not have been allowed to proceed.

Let us apply this decision to the appellant’s reasoning that it is not barred from maintaining this action because it is a grantee of real property, not an assignee of a chose in action. In the very case of *Smith v. Kernochan*, supra, cited by appellant itself, the Court holds that in a jurisdiction where the mortgagee takes legal title to the property, the assignee or grantee of such mortgagee cannot main-

tain an action unless the mortgagee could maintain it. It follows that even if we concede the appellant's point, that it is a grantee of the title to land, not an assignee of a chose in action, we have at least one case which denies appellant the right to maintain this action under its own theory. At all events, *in cases where the plaintiff seeks to enforce rights under a contract of mortgage*, whether he be regarded as an assignee or a grantee, he must first show that his assignor or grantor could have maintained the action. It therefore becomes unnecessary for appellees to discuss the cases referred to on pages 11 to 14 of appellant's brief which concern the rights of grantees *in cases other than mortgage.*

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### III.

#### **APPELLANT IS NOT BRINGING THIS ACTION AS THE GRANTEE OF TITLE TO REAL PROPERTY: BUT IS BRINGING THE ACTION AS ASSIGNEE OF A CHOSE IN ACTION, TO REDEEM REAL PROPERTY FROM A MORTGAGEE.**

Despite the legal refinements which surround the mortgagor and mortgagee, in the last analysis, it is impossible to escape the conclusion that their rights and duties toward one another arise out of contract.

The appellant devotes pages 15 to 20 of its brief to a discussion of the theory and nature of a mortgage under the California system. Appellant contends with much force that the learned Court below misconceived the nature of this action. To take up and analyze in turn the California cases referred to,

defining the status of parties to a mortgage would needlessly encumber this brief. Let us rather admit the propositions appellant advances, to wit: that every transfer of an interest in property, made only as security, is to be deemed a mortgage; that this principle applies no matter how absolute the form of the deed; that the policy of the law is such that it will not permit the parties to contract that any title shall pass by the instrument. And having admitted these propositions, have we escaped the undeniable proposition that in the last analysis the rights of the parties are founded on *contract*?

The conclusion to which we are irretrievably led cannot be stated with more clarity, nor with more verity, than by adopting the language employed by the learned judge of the District Court in his opinion in this case. He declares:

“However the action may be denominated, it seems quite clear to me that *what is sought here is the enforcement of the original contract* between the Central Counties Land Company and the Capay Ditch Company, and the rights asserted are based wholly thereon.

The Court is asked to decalre the instrument in the form of deed to be a mortgage, and to do this because the parties agreed that it was such. *If it were not for this agreement, plaintiff would have no cause of action against defendants.* This agreement is a chose in action, and this suit being to recover upon it, falls within the terms of section 24, above quoted, and cannot be maintained.”

In the last analysis then, the appellant is seeking to recover upon a chose in action based on a con-

tract, seeking to redeem land held by the Ditch Company under a mortgage, *seeking specific performance of the mortgagee's contract to reconvey the land on repayment of the loan.*

The cases holding that an assignee of one having the right to compel specific performance of a contract to convey land cannot maintain an action in the Federal Courts unless his assignor could have done so, are legion.

The language in the case of *Corbin v. Black Hawk County*, 105 U. S. 659; 26 L. ed. 1136, is very illuminating:

“There can be no doubt that the original contracts in this case are choses in action, in respect to the rights acquired thereunder by the parties thereby contracting to purchase the lands in question. It is equally clear that by the instruments executed to the plaintiff by such purchasers, selling and conveying to him their several interests in the several tracts of land and assigning to him all their rights under said several contracts, he became the assignee of the contracts, as choses in action, in respect to the rights of the assignors thereunder, including their rights of action thereon which are sought to be enforced in this suit. The only question for consideration is, whether the suit is one to recover the contents of the contracts.

\* \* \*

*The suit is really one for the specific performance of the contracts, to enforce them, to realize the fruits of the rights secured by them to the purchasers, and to reinstate the plaintiff in the position which he is entitled to occupy under the contracts as assignee thereof, notwithstanding any acts done by the county or*

its officers in impairment of the rights acquired by the contracts. Such a suit must be regarded as one to recover the contents of the contracts. The contents of a contract, as a chose in action, in the sense of section 629, are the rights created by it in favor of a party in whose behalf stipulations are made in it which he has a right to enforce in a suit founded on the contract; and a suit to enforce such stipulations, is a suit to recover such contents. The promise to pay money, contained in a promissory note, is all that there is of the note. A suit to enforce the payment of the money is a suit to recover the contents of the note, because there is nothing contained in the note but the promise. The promise to receive the money, stipulated in these contracts to be paid by the purchasers as a foundation for their right to receive patents, is, so far as this suit is concerned, the essence of the contracts; and a suit to compel the acceptance of that money is a suit to enforce such promise and, therefore, is a suit to recover the contents of the contracts. \* \* \*

Following out this principle, *the obligation or the premise contained in a contract is its contents*, when a suit is brought to enforce such obligation; and it does no violence to language to say that the suit is one to recover such contents."

The case of *Shoecraft v. Bloxham*, 124 U. S. 730; 31 L. ed. 574, merits our close attention. In this case a railroad held certain contracts for the conveyance of land. This railroad issued certain bonds to the plaintiff and as security gave a trust deed or mortgage covering "any right, title and interest which it had or might thereafter acquire in and to the lands granted or agreed to be

granted", under the terms of the aforesaid contract. In other words, the railroad had an equitable title to land, which it mortgaged to plaintiff. The plaintiff brought this action to foreclose the mortgage and compel the specific performance of the contract to convey the land. The Court held that plaintiff could not maintain the action because subject to the same disability as the railroad. The Court says:

"The object of the suit is to perfect the title to the lands mortgaged by enforcing the performance of the contract. The deed of trust sets out in full the contract, and conveys all the right, title and interest which the railroad company had or might thereafter acquire in and to the lands granted by the trustees by their contract of May 31, 1871. *This conveyance of all right, title and interest 'in and to' the lands granted, or agreed to be granted, by the contract of sale, carried with it to the complainant an interest in the contract so far as such lands were concerned, that is, the right to perfect the title to the lands by enforcement of the contract. It was in legal effect the assignment of the contract itself.* If he cannot enforce that contract and thus secure the title to the company, the deed of trust, so far as the lands covered by the contract are concerned, is worthless as a security. If he has no interest in the contract he has no standing in court to ask its enforcement; and if he is to be regarded as an assignee of the contract under the deed of trust, he is disabled from maintaining the suit in the circuit court, by Section 629 of the Revised Statutes. He is subject to the same disability in that respect as his assignor."

## IV.

**FINALLY, APPELLANT MAINTAINS THAT THIS IS AN ACTION TO REMOVE A CLOUD FROM TITLE, NOT TO RECOVER ON A CHOSE IN ACTION.**

The theory of appellant, we take it, is this: The notes given by the Land Company to the Ditch Company are outlawed, and under Section 2911 of the Civil Code, the lien of the mortgage is extinguished. The California cases referred to in pages 21 and 22 of appellant's brief, hold that the remedy of the mortgagor, or his assignee, to redeem the property becomes one *to quiet title, on paying the mortgage debt*. Again we find ourselves confronted with code provisions and decisions defining the rights and liabilities of mortgagor and mortgagee. But though the mortgagor or his assignee seeks to quiet title, it is still incumbent on him to repay the mortgage debt as a condition precedent to such relief. And why? Because he is a party to a contract and has assumed this obligation as a part of such contract. We cannot get away from Section 2920 of the Civil Code which defines mortgage as "*a contract by which specific property is hypothecated for the performance of an act, without the necessity of a change of possession*".

In conclusion, we submit that plaintiff, appellant here, is seeking to redeem land from a mortgage, that appellant is an assignee suing "to recover upon a chose in action"—namely, to enforce specific performance of a contract of mortgage, and as

appellant's assignor could not maintain the action, it is under a like disability.

For each and all of the foregoing reasons, we submit that the decree dismissing the bill for want of jurisdiction was eminently proper, and should be sustained.

Dated, San Francisco,  
March 10, 1915.

S. C. DENSON,  
JOHN S. PARTRIDGE,  
ALAN C. VAN FLEET,  
*Attorneys for Appellees.*

No. 2501

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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POWER AND IRRIGATION COMPANY OF  
CLEAR LAKE, a Corporation, Organized  
and Existing Under the Laws of the State of  
Arizona,

Appellant,  
vs.

L. D. STEPHENS and YOLO WATER AND  
POWER COMPANY, a Corporation, Organ-  
ized and Existing Under the Laws of the State  
of California,

Appellees.

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**Transcript of Record.**

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Upon Appeal from the United States District Court  
for the Northern District of California,  
Second Division.

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F. D. Monckton,  
Clerk

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**No. 2501**

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**POWER AND IRRIGATION COMPANY OF  
CLEAR LAKE, a Corporation, Organized  
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**Appellant,**

**vs.**

**L. D. STEPHENS and YOLO WATER AND  
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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court of the United States for the  
Northern District of California.*

POWER AND IRRIGATION COMPANY OF  
CLEAR LAKE, a Corporation, Organized  
and Existing Under the Laws of the State of  
Arizona,

Plaintiff,

vs.

L. D. STEPHENS and YOLO WATER AND  
POWER COMPANY, a Corporation, Or-  
ganized and Existing Under the Laws of the  
State of California,

Defendants.

**Complaint.**

The above-named plaintiff complains of the above-named defendants, and for cause of action alleges:

**I.**

That the plaintiff now is and ever since the 9th day of April, 1913, has been a corporation duly organized and existing under and by virtue of the laws of the State of Arizona.

**II.**

That the defendant L. D. Stephens is now, and at all the times hereinafter mentioned has been, a resident and citizen of the State of California.

**III.**

That the defendant Yolo Water and Power Company now is and ever since the 11th day of December, 1911, has been a corporation duly organized and existing under and by virtue of the laws of the State of California.

## IV.

That heretofore and on, to wit, the 10th day of October, 1906, one Mary B. Collier and Wm. B. Collier, her husband, entered into a certain contract of sale with one L. J. Shuman, [1\*] which said contract of sale was and is in the words and figures following, to wit:

“San Francisco, California, October 10, 1906.

“In consideration of the sum of Twenty-two hundred (2200) Dollars, gold coin of the United States, the receipt whereof is hereby acknowledged as payment on account of the purchase price herein provided for, MARY B. COLLIER and WILLIAM B. COLLIER, her husband, both of the County of Lake, State of California, hereinafter designated as the Sellers, promise and agree to sell to L. J. SHUMAN of the County of Lake, State of California, or his assigns, hereinafter designated as the Purchaser, for the sum of Twenty-two Thousand Five Hundred (\$22,500.00) Dollars upon the terms and conditions herein mentioned, all that certain real property situate, lying, and being in the County of Lake, State of California and particularly described as follows, to wit:

“FIRST. Lot Seven (7) and the Southwest quarter of the Northeast quarter and the East half of the Northwest quarter of Section 31, in Township fifteen (15) North, Range 9 West, M. D. B. & M.; also the swamp and overflowed lands comprised within Survey Number 26 and all other lands and interest in lands situate in the County of Lake, State

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\*Page-number appearing at foot of page of original certified Record.

of California, owned or held by the Sellers, excepting, however, a parcel of land particularly described as follows:

“Beginning at the Northeast corner of the Southeast quarter of the Northeast quarter of Section 31, in Township 15 North, Range 9 West, M. D. B. & M. and running thence West six hundred (600) feet; thence at right angles South one hundred and twenty (120) feet; thence at right angles East one hundred (100) feet; thence at right angles South fifty-five (55) feet; thence at right angles East five hundred (500) feet; thence at right angles North one hundred and seventy-five (175) feet to the place of beginning; and also excepting all swamp and overflowed lands now standing in the name of the Sellers and lying between the Northerly and Southerly boundary lines of the excepted parcel just described produced Easterly.

“SECOND. A perpetual right of way sixty (60) feet wide for a road or boulevard over the parcel of land excepted from the operation of this Agreement along the Lake shore; said right of way to be located by the Sellers upon ten (10) days’ notice so to do from the Purchaser.

“THIRD. The right to overflow the lands of the Purchaser reserved from the operation of this Agreement to the extent caused by raising the level of Clear Lake a perpendicular distance of seven feet four inches (7' 4") above the low-water mark established by the United States Government and to maintain the level of said Lake at all seasons of the year a distance of seven feet four inches (7' 4")

measured perpendicularly above said low-water mark.

“The Sellers agree to furnish an abstract of title complete to date within sixty (60) days after date; the Purchaser is allowed thirty (30) days after receipt of said contract within which to examine title. Objections to title, if any shall be reported to the Sellers, in writing, within said period of thirty (30) days, and if not so reported, shall be deemed to have been waived. The Sellers agree to remove defects rendering [2] the title unmerchantable and specified by the Purchaser in his written report of objections, but if said defects are not removed within sixty (60) days after the receipt of said written report by the Sellers, the Purchaser may at his option insist upon the specific performance of this agreement, extend the time for the removal of said defects, or declare this agreement at an end, in which latter event, the Sellers agree to return to him the sum of money herein received for and any further sums paid on account of said purchase price. But if the sale herein provided for is not consummated under the terms and conditions of this agreement, by reason of the failure of the Purchaser to pay the balance of the Purchase price when due as herein provided, then the sums of money paid by the Purchaser on account of the purchase price shall be forfeited and retained by the Sellers as liquidated damages.

“The balance of the purchase price, the sum of Twenty Thousand Two Hundred and Fifty (\$20,-250.00) Dollars shall be paid as follows:

“FIRST. The sum of Twenty-two Hundred and

Fifty Dollars shall be paid on or before the second day of January, 1907.

“SECOND. The further sum of Twenty-two Hundred and Fifty (\$2250.00) Dollars shall be paid on or before the second day of April, 1907.

“THIRD. The further sum of Twenty-Two Hundred and Fifty (\$2,250.00) Dollars shall be paid on or before the second day of July, 1907.

“FOURTH. The further sum of Thirteen Thousand Five Hundred (\$13,500.00) Dollars shall be paid on or before the second day of October, 1907.

“The Purchaser promises and agrees to pay interest upon all deferred payments at the rate of six per cent (6%) per annum; interest payments to be made at the same time that the payments on account of the principal are made.

“The Sellers promise and agree concurrently with the payment of the sum of Twenty-two Hundred and Fifty (\$2250.00) Dollars to be paid on or before the second day of July, 1907, to deliver to the Purchaser, or his assigns, a good and sufficient deed of grant, bargain and sale, conveying the property herein above described to said Purchaser or his assigns, free and clear from all liens or incumbrances; provided, however, said Purchaser or his assigns shall at said time make, execute, and deliver to the Sellers his promissory note for the principal sum of Thirteen Thousand Five Hundred (\$13,500.00) Dollars due on or before the second day of October, 1907, as aforesaid, and interest thereon, at the rate of six per cent (6%) per year until paid and a mortgage covering on all of said above described land to

6        *Power & Irrigation Co. of Clear Lake*

secure the payment of said note.

“The possession of said property is to remain in the Sellers’ hands until the making of the payment of the sum of Twenty-two Hundred and Fifty (\$2250.00) Dollars which is due on or before January 2, 1907, and at said time to be delivered to the purchaser.

“It is distinctly understood and agreed by and between the parties hereto that the Sellers may remove and take the workshop and the three-room cottage now on the premises hereby agreed to be sold.

[3]

“L. J. Shuman agrees to purchase the property above described for the price and upon the terms and conditions herein provided. Time is the essence of this agreement.

“IN WITNESS WHEREOF, the Sellers and Purchaser hereunto set their hands and seals the day and year first above written.

MARY B. COLLIER. (Seal)

WM. B. COLLIER. (Seal)

L. J. SHUMAN. (Seal)

Witness to Wm. B. Collier signature:

FREDERICK E. WARD.

State of California,

County of Lake,—ss.

“On this 10th day of October, A. D. 1906, before me, H. V. Keeling, a Notary Public in and for said County and State residing therein, duly commissioned and sworn, personally appeared Mary B. Collier, personally known to me to be the person described in, and whose name is subscribed to, the

within instrument, and acknowledged to me that she executed the same.

"IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal]

H. V. KEELING,

Notary Public in and for the County of Lake, State of California."

V.

That thereafter, and prior to the 7th day of May, 1907, said L. J. Shuman, in consideration of Ten Dollars (\$10.00) paid to him by the California Industrial Company, a corporation, organized and then existing under the laws of the State of California, granted, transferred, conveyed, and assigned unto the said California Industrial Company, a corporation, all his rights under the said written instrument hereinabove referred to.

VI.

That thereafter and on the 7th day of May, 1907, the said Mary B. Collier and William B. Collier, her husband, parties of the first part to the written instrument, a copy of which is hereinabove set forth, entered into another and supplemental agreement with the California Industrial Company, a corporation, organized and then existing under and by virtue [4] of the laws of the State of California, which said contract was and is in the words and figures following, to wit:

"WHEREAS, MARY B. COLLIER AND WILLIAM B. COLLIER, her husband, both of Lake County, State of California, did enter into a

certain contract of sale, dated October 10th, 1906, with L. J. SHUMAN, for the sale of the Ranch of said MARY B. COLLIER, situated on the shores of Clear Lake, in said County and State, for the sum of \$22,500.00; a copy of which said contract is hereto attached and made a part hereof;

“AND WHEREAS, the said L. J. SHUMAN has assigned all of his right, title and interest in and to said contract of sale to the CALIFORNIA INDUSTRIAL COMPANY, a California corporation;

“AND WHEREAS, said contract provides that there is reserved to the said MARY B. COLLIER, a certain lot, piece, or parcel of land described as follows, to wit:

“Beginning at the Northeast corner of the Southeast quarter of the Northeast quarter of Section 31 in Township 15 North, Range 9 West, M. D. B. & M. and running thence West six hundred (600) feet; thence at right angles South one hundred and twenty (120) feet; thence at right angles East one hundred (100) feet; thence at right angles South fifty-five (55) feet; thence at right angles East five hundred (500) feet; thence at right angles North one hundred and seventy-five (175) feet to the place of beginning; and also excepting all swamp and overflowed lands now standing in the name of the sellers and lying between the Northerly and Southerly boundary lines of the excepted parcel just described produced easterly.

“AND WHEREAS, the said MARY B. COLLIER did further grant to said SHUMAN, under the terms of said contract, a perpetual right of way

over said reserved land as follows, to wit: Being a perpetual right of way sixty (60) feet wide for a road or boulevard over the parcel of land hereinabove described.

“AND WHEREAS, the said MARY B. COLLIER did also grant to said SHUMAN, under the terms of said contract a right to overflow her said reserved lands with the waters of Clear Lake up to a level of 7 feet, four inches above the United States low-water mark, and which said right of overflow is described therein as follows, to wit:

“The right to overflow the lands of the Purchaser, reserved from the operation of this Agreement to the extent caused by raising the level of Clear Lake, a perpendicular distance of seven feet four inches (7' 4") above the low-water mark established by the United States Government and to maintain the level of said Lake at all seasons of the year a distance of seven feet four inches (7' 4") measured perpendicularly above said low-water mark.

“AND WHEREAS the said MARY B. COLLIER is desirous of reserving to herself more land than the said tract reserved to her as described above;

“NOW, THEREFORE, this agreement WITNESSETH: That for and in consideration of the said CALIFORNIA INDUSTRIAL [5] COMPANY allowing the said MARY B. COLLIER to reserve, in lieu of the said lands above described and reserved to her, the following tract of land situated on Clear Lake, Lake County, California, viz.:

“Beginning at a point on the East line of the Lake

10      *Power & Irrigation Co. of Clear Lake*

Land Tract, belonging to said Mary B. Collier, South 27.04 chains and East 5.22 chains, from the common Section corner to Sections 29-30-31-32, T. 1 S. N. R. 9 W., M. D. M. and running thence North along the East boundary of said Lake Land Tract 7.04 chains to the Northeast corner thereof, thence West 3.72 chains to a point on the east line of Lot 1 of said Section 32, thence South 31 deg. West along said East line of said Lot 1, 2.91 chains, to a point on the Section Line between said Section 31 and 32, thence North 2.50 chains, to the Northeast corner of Lot 7 of said Section 31, thence West 764 feet, more or less, to a stake on the North boundary line of said lot 7, thence South 53 deg. East 304 feet, more or less, to a stake, thence South 71 deg. 35' East 269.7 feet to a stake on the boulevard survey, being Eng. Station 244+00, thence Southeasterly to the point of beginning;

“The said MARY B. COLLIER and WILLIAM B. COLLIER (her husband) hereby grant to the said CALIFORNIA INDUSTRIAL COMPANY in lieu of the right of way described in the second articles of said contract of sale, a right of way for Boulevard purposes over her reserved lands herein above described, and also over all of her other lands as described in said contract of sale, the said right of way and reserved lands being shown and described on the plat of a survey thereof hereto attached and made a part hereof, and the particular location of said right of way being also shown on the description thereof hereto attached and also made a part hereof.

“The said MARY B. COLLIER and WILLIAM B. COLLIER hereby further grant to the CALIFORNIA INDUSTRIAL COMPANY the right to overflow the lands herein reserved to her and taken in lieu of those reserved under said contract of sale, by raising the waters of Clear Lake, California, to a height or level of nine (9) feet above the United States Government low-water mark on said Lake.

“All of the above grants, rights, and agreements are conditional and depend upon the carrying out of the said contract of sale and the paying to said MARY B. COLLIER all moneys under it as therein specified, fully and completely, time being the essence of this contract.

“It is further agreed between the parties hereto that the said MARY B. COLLIER shall have the right at all times to use the said Boulevard for Boulevard purposes, and that this grant, and its covenants and agreements, shall apply to and bind the heirs, executors, administrators, successors and assigns, of the respective parties hereto.

“IN WITNESS WHEREOF, the said MARY B. COLLIER and WILLIAM B. COLLIER, have hereunto set their hands and seals, and the said CALIFORNIA INDUSTRIAL COMPANY, have executed these presents by its President and Secretary thereunto duly authorized, and has caused its

corporate seal to be attached, this 7th day of May,  
A. D. 1907.

MARY B. COLLIER. (Seal)

WILLIAM B. COLLIER. (Seal) [6]

CALIFORNIA INDUSTRIAL COMPANY. (Seal)

By T. OTWAY SADLIER,  
President

And EDWARD O. ALLEN.

Secretary.'

“State of California,  
City and County of San Francisco,—ss.

On this 11th day of May, in the year of our Lord, one thousand nine hundred and seven, before me, FRANK L. OWEN, a Notary Public in and for said City and County and State, residing therein, duly commissioned and sworn, personally appeared WILLIAM B. COLLIER, known to me to be the person described in and whose name is subscribed to the within instrument and he acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the City and County and State aforesaid, the day and year in this certificate first above written.

[Seal] FRANK L. OWEN,  
Notary Public in and for the City and County of  
San Francisco, State of California."

"State of California,  
County of Lake—ss

"On this 7th day of May, in the year one thousand nine hundred and seven before me, H. W. BREWER,

a Notary Public in and for the County of Lake, personally appeared MARY B. COLLIER known to me to be the same person whose name is subscribed to the within instrument, and who duly acknowledged to me that she executed the same.

"IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the County of Lake, the day and year in this certificate first above written.

[Seal] H. W. BREWER,  
Notary Public in and for the County of Lake, State  
of California."

That a copy of the aforesaid agreement dated October 10th, 1906, hereinabove set forth, was annexed to the original of the aforesaid agreement of May 7th, 1907.

## VII.

That thereafter and prior to the date of the last payment, provided for in the aforesaid contracts, the said California Industrial Company, for a valuable consideration, sold, transferred, assigned and set over the said agreement, and all [7] of its rights thereunder, unto the Central Counties Land Company, a corporation duly organized and then existing under and by virtue of the laws of the State of California.

## VIII.

That pursuant to the aforesaid agreements, hereinabove set forth, the said California Industrial Company, and the said Central Counties Land Company, proceeded to and did perform all of the covenants, terms and conditions upon the part of the

said California Industrial Company to be kept and performed, and paid to the said Mary B. Collier and William B. Collier, her husband, the amount of Fifteen thousand five hundred (\$15,500.00) dollars, together with interest amounting to the sum of twelve hundred and fifty (\$1250.00) dollars, or thereabouts.

#### IX.

That at the time fixed in and by the said contract for the last or final payment thereon, said California Industrial Company and said Central Counties Land Company had paid all of the moneys provided in said agreement to be paid, and all interest due upon deferred payments, save and except the sum of seven thousand (\$7,000.00) dollars.

#### X.

That on or about the said date, the said Mary B. Collier and William B. Collier, her husband, made and entered into a further agreement with the said Central Counties Land Company, wherein and whereby they covenanted and agreed that the said Central Counties Land Company should have a further extension of time in which to make the said final payment, and wherein and whereby the said Mary B. Collier and William B. Collier, her husband, further agreed that upon receiving the balance of seven thousand (\$7,000.00) dollars, together with interest, they, the said Mary B. Collier, and William B. Collier, [8] her husband, would grant, bargain, sell, and convey all of the said property described and agreed to be conveyed in and by the instruments above referred to, unto the said Central Counties Land Company.

## XI.

That thereafter the said Central Counties Land Company applied to the said L. D. Stephens for the loan of seven *thousand* (\$7,000.00), with which to make the said last payment, called for by the said agreements, and the said L. D. Stephens covenanted and agreed, to and with the said Central Counties Land Company, that if the said Central Counties Land Company would cause the said contracts hereinabove set forth, to be assigned to him, that he, the said L. D. Stephens, would pay said balance called for by the said contracts, to the said Mary B. Collier and William B. Collier, her husband, and that he would thereupon take the deed to the properties therein provided for, in his, said L. D. Stephens' own name, and would hold the same as security for the repayment to him, said L. D. Stephens, of the said money so advanced, together with interest thereon; and that thereafter, upon demand, he would convey the said properties to the said Central Counties Land Company, or its assigns, upon receiving from the said Central Counties Land Company, the repayment of the said loan of seven thousand (\$7,000.00) dollars, together with legal interest thereon; and covenanted and agreed that the said Central Counties Land Company should have fifteen (15) days time in which to make such payment, after receiving notice from him, the said L. D. Stephens, that he wished such payment to be made.

That thereupon the said Central Counties Land Company agreed and assented to all of the aforesaid terms of the said L. D. Stephens, and thereupon the

16      *Power & Irrigation Co. of Clear Lake*

said Central Counties Land Company duly assigned the said contract with the said Mary B. [9] Collier and William B. Collier, her husband, to the said L. D. Stephens, and the said L. D. Stephens thereupon advanced to said Central Counties Land Company and paid to the said Mary B. Collier and William B. Collier, the said sum of seven thousand (\$7,000.00) dollars, and received an instrument in form of a grant, bargain, and sale deed, from the said Mary B. Collier and William B. Collier, her husband, conveying the said property to him, the said L. D. Stephens.

That the said Central Counties Land Company had entered into the possession of all of the properties so agreed to be conveyed to it, under and pursuant to the terms of its agreement with the said Mary B. Collier and William B. Collier, and that at the time of the execution of the said deed by the said Mary B. Collier and William B. Collier, her husband, to the said L. D. Stephens, a tenant of the said Central Counties Land Company was in the possession of the said property. That said tenant did not attorn to the said Stephens, but continued to hold possession thereof, as the tenant of the said Central Counties Land Company, and that at all times thereafter, and until on or about the 1st day of November, 1911, said property continued to be and was in the possession of tenants, who at all times attorned to the said Central Counties Land Company;

XII.

That from time to time, during the said period, the said Central Counties Land Company, paid unto

the said L. D. Stephens divers sums of money, for and on account of the principal and interest due upon the said loan so made by him, the said L. D. Stephens, to the said Central Counties Land Company; that plaintiff is informed and believes, and upon such information and belief, avers, that said sum so paid, as aforesaid, amounted to a total of seven hundred and fifty (\$750.00) dollars, or thereabouts.

That since the said 1st day of November, 1911, the defendants, [10] L. D. Stephens and Yolo Water and Power Company have received and collected the rental from the said property.

### XIII.

That on the said 1st day of November, 1911, the said L. D. Stephens was indebted to the said Central Counties Land Company, jointly and severally, with divers other persons upon the unpaid subscription for and on account of six hundred and thirty-three (633) shares of the capital stock of the said Central Counties Land Company, which had been subscribed for by the said Stephens and other persons, jointly, and issued at their joint direction, at seventy-five per cent (75%) of their par value, leaving an amount of twenty-five per cent (25%) thereon, unpaid. That the par value of the said stock was one hundred (\$100.00) dollars per share, and that the total amount so due and owing to the said Central Counties Land Company, its successors and assigns, upon said unpaid subscription was and is the sum of fifteen thousand eight hundred and twenty-five (\$15,825.00) dollars.

**XIV.**

By the inadvertence of its officers, said Central Counties Land Company failed to pay its license tax due the State of California for the year 1911, and on the 30th day of November, 1911, the charter and right of the said corporation, to do business, were duly declared forfeited, pursuant to the laws of the State of California ; that thereupon, the Board of Directors of said corporation, pursuant to law, became vested with all the property and assets of the said Central Counties Land Company, in trust for the creditors and stockholders of the said corporation ;

**XV.**

That thereafter on the 24th day of March, 1912, the said defendant, L. D. Stephens, became indebted to the said Central [11] Counties Land Company, and its former Board of Directors and Board of Trustees, in a sum far in excess of the amount of principal and interest due from said Central Counties Land Company to the said L. D. Stephens, for and on account of the aforesaid loan by said L. D. Stephens to the said Central Counties Land Company ; that the said L. D. Stephens has never repaid to the said Central Counties Land Company, or its former Board of Directors, or Board of Trustees, or to their successors or assigns, any part or portion of the amount so due from the said L. D. Stephens to the said Central Counties Land Company, and its former Board of Directors and Board of Trustees.

**XVI.**

That the said L. D. Stephens has never at any time notified the said Central Counties Land Company, or its former Board of Directors, or Board of

Trustees, or its successors in interest, that he desired payment to be made for said moneys so advanced and loaned by him to the said Central Counties Land Company.

## XVII.

That it is equitable and just that there be set off *pro tanto*, as against all claims of the said L. D. Stephens, for and on account of his aforesaid loan and interest, the aforesaid claims of the said corporation, and its said Board of Trustees, to which said claims, plaintiff has succeeded, as hereinafter set forth.

## XVIII.

That prior to the commencement of this action, the said Board of Directors of said defunct corporation, Central Counties Land Company, acting as Trustees for the benefit of the Creditors and stockholders of said defunct corporation, duly sold, assigned, transferred and conveyed unto the plaintiff, above named, the aforesaid lands, and the full equitable title thereto [12] has by mesne conveyances become vested in this plaintiff, and that plaintiff is now the lawful owner and holder thereof.

## XIX.

That at all times since its incorporation, the defendant, Yolo Water and Power Company, has had full knowledge and notice of all the matters and things hereinabove set forth, affecting the title to the said lands described in aforesaid contracts and deeds.

## XX.

That plaintiff is informed and believes, and upon

such information and belief, avers, that the said L. D. Stephens has executed an instrument, purporting to convey the title to said lands, to the defendant, Yolo Water and Power Company, and plaintiff avers that if such transaction has in fact taken place, said defendant, Yolo Water and Power Company is not an innocent purchaser in good faith, or without notice.

## XXI.

That plaintiff is ready, able, and willing to pay to the said defendants, any sums of money due and owing to them, or either of them, for or on account of the moneys so loaned to the Central Counties Land Company, by the said defendant, L. D. Stephens, together with interest thereon, and to account to the said defendants for all taxes, if any, which have been paid upon the said properties, but said amount of principal, if any, and of interest, if any, and of taxes, if any, can only be ascertained upon an accounting.

[13]

WHEREFORE, plaintiff prays judgment and decree of this court:

1. That it be ordered, adjudged, and decreed that plaintiff is the owner of all the property herein described, and that plaintiff is entitled to be let into possession forthwith, upon paying to the said defendant, L. D. Stephens, or to his successors or assigns, the sums of money, if any, which, upon an accounting herein, the Court may find and ascertain to be due and owing to the said defendant, L. D. Stephens, or his assigns, for or on account of the transactions hereinabove set forth.

2. That an accounting of the rents, issues, and

profits, of the said property, and of all taxes, paid thereon, and of any and all amounts that may be due from the tenants, or either of them, to the said plaintiff be had. And

3. For such other, further different, or additional relief as is meet in the premises and conformable to equity.

CHARLES S. WHEELER and  
JOHN F. BOWIE,

Attorneys for Plaintiff.

HARDING & MONROE,

Of Counsel. [14]

State of California,

City and County of San Francisco,—ss.

H. S. Elliot, being first duly sworn, deposes and says:

That he is the President of Power and Irrigation Company of Clear Lake, plaintiff in the above-entitled action, and that he makes this affidavit in its behalf; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information and belief, and as to those matters, that he believes it to be true.

H. S. ELLIOT.

Subscribed and sworn to before me this 24th day of April, 1913.

[Seal] ELLA L. SMITH,  
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Apr. 25, 1913. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [15]

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*In the United States District Court for the Northern  
District of California.*

No. 15—IN EQUITY.

POWER & IRRIGATION COMPANY OF CLEAR  
LAKE, a Corporation,

Plaintiff,

vs.

L. D. STEPHENS and YOLO WATER AND  
POWER COMPANY, a Corporation, Organized  
and Existing Under the Laws of the  
State of California.

Defendants.

**Motion to Dismiss Bill of Complaint.**

Now come all of the defendants, by their solicitors, and move the above-named court to dismiss the bill of complaint in the above-entitled action, upon the following grounds:

I.

That the facts stated in said bill of complaint are not sufficient to constitute a valid cause of action in equity against these defendants, or either or any of them.

II.

That it appears upon the face of the said bill of complaint that the cause of action therein attempted to be set up is barred by the laches of plaintiff and its assigns.

III.

It appears upon the face of said bill of complaint that the cause of action therein attempted to be set up is barred by the provisions of subdivision 1, of section 337, of the Code of Civil Procedure of the State of California.

IV.

It appears upon the face of the said bill of complaint that the cause of action therein attempted to be set up is barred by the provisions of section 343 of the Code of Civil [16] Procedure of the State of California.

A. E. SHAW,  
BERT SCHLESINGER,  
S. C. DENSON,  
THEODORE A. BELL,  
JOHN S. PARTRIDGE,

Solicitors and of Counsel for Defendants,

Receipt of a copy of the within Motion to Dismiss this 10th day of June 1913, is hereby admitted.

CHARLES S. WHEELER and  
JOHN F. BOWIE,

Attorneys for Plaintiff.

HARDING & MONROE,

Of Counsel.

[Endorsed]: Filed Jun. 10, 1913. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [17]

*In the District Court of the United States, for the  
Northern District of California.*

No. 15—IN EQUITY.

Division 2.

POWER AND IRRIGATION COMPANY OF  
CLEAR LAKE, a Corporation Organized and  
Existing Under the Laws of the State of Cali-  
fornia,

Plaintiff,

vs.

L. D. STEPHENS, and YOLO WATER AND  
POWER COMPANY, a Corporation Or-  
ganized and Existing Under the Laws of the  
State of California.

Defendants.

**Notice of Hearing Motion to Dismiss Bill of  
Complaint.**

To the Defendants, and Each of Them, in the Above-  
entitled Action, and to Messrs A. E. Shaw, Bert  
Schlesinger, S. C. Denson, Theodore A. Bell  
and John S. Partridge, their Attorneys:

You, and each of you, will please take notice that  
the defendants' Motion to Dismiss the Bill of Com-  
plaint in the above-entitled action, will be called for  
hearing in the above-entitled court, Division 2, at  
the courtroom of said Court in the Postoffice build-  
ing, San Francisco, California, on Monday, June 16,  
1913, at 10 o'clock A. M.

Dated, June 10, 1913.

CHARLES S. WHEELER and  
JOHN F. BOWIE,

Attorneys for Plaintiff.

HARDING & MONROE,  
Of Counsel.

Due service and receipt of a copy of the within Notice this 10th day of June, 1913, is hereby admitted.

A. E. SHAW,  
BERT SCHLESINGER,  
JOHN S. PARTRIDGE,  
THEODORE A. BELL,  
DENSON, COOLEY & DENSON,  
S. C. DENSON,

Attorneys for Defendants. [18]

[Endorsed]: Filed Jun. 10, 1913. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [19]

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*In the District Court of the United States, in and for  
the Northern District of California, Second Di-  
vision.*

No. 15—IN EQUITY.

POWER & IRRIGATION COMPANY OF CLEAR  
LAKE, a Corporation,

Plaintiff,

vs.

L. D. STEPHENS et al.,

Defendants.

**Memorandum Decision on Motion to Dismiss Bill.**

CHARLES S. WHEELER and JOHN F.  
BOWIE, Attorneys for Plaintiff.

A. E. SHAW, BERT SCHLESINGER, DEN-  
SON, COOLEY & DENSON, THEODORE  
A. BELL and MASTICK & PARTRIDGE,  
Attorneys for Defendants.

The principles applicable here are similar to those applied in Power and Irrigation Company of Clear Lake et al. vs. Capay Ditch Company et al. (No. 14), and the motion to dismiss the bill must be granted.

It is so ordered.

March 10th, 1914.

M. T. DOOLING,  
Judge.

[Endorsed]: Filed Mar. 10, 1914. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [20]

*In the District Court of the United States, in and for  
the Northern District of California, Second Di-  
vision.*

No. 14— IN QUITTY.

POWER AND IRRIGATION COMPANY OF  
CLEAR LAKE, a Corporation,

Plaintiff,

vs.

CAPAY DITCH COMPANY, a Corporation, YOLO  
COUNTY CONSOLIDATED WATER COM-  
PANY, a Corporation, YOLO WATER AND  
POWER COMPANY a Corporation, J. M.  
ADAMSON, L. D. STEPHENS, and  
JOSEPH CRAIG,

Defendants.

**Opinion and Order Dismissing Bill.**

CHARLES S. WHEELER and JOHN F.  
BOWIE, Attorneys for Plaintiff.

A. E. SHAW, BERT SCHLESINGER, DEN-  
SON, COOLEY & DENSON, THEODORE  
A. BELL and MASTICK & PARTRIDGE,  
Attorneys for Defendants.

The plaintiff is a corporation organized under the laws of the State of Arizona.

The complaint avers that the Central Counties Land Company, a corporation, organized under the laws of the State of California was on November 18th, 1907, the owner of certain lands in Lake County, and on that day borrowed from defendant Capay Ditch Company three several sums of money,

\$5,625.00, \$8,320.75 and \$10,625.00, and executed and delivered to said Ditch Company its three several promissory notes for the said amounts all payable on or before August 1st, 1908. That contemporaneously, and as a part of the same transaction, and solely for the purpose of securing the payment of said notes, the said Central Counties Land Company executed and delivered to said Ditch Company an instrument in writing, in form a grant, bargain and [21] sale deed, but intended as a mortgage, conveying to said Ditch Company the said lands in Lake County; that on December 18th, 1911, the said Ditch Company conveyed said lands to defendant Yolo County Consolidated Water Company, which company thereafter conveyed the said lands to defendants L. D. Stephens and Joseph Craig, who in turn conveyed the same to defendant Yolo Water and Power Company, and that each and all of the defendants named took said conveyances with full knowledge of the real nature of the original deed from the Central Counties Land Company to the Capay Ditch Company; that plaintiff is the successor in interest of said Central Counties Land Company, and all of the title to said lands has by mesne conveyances become and is now vested in plaintiff, and that all of the demands of said Central Counties Land Company against the defendants have been transferred to plaintiff. This action seeks to have the deed to the Capay Ditch Company adjusted a mortgage, and that leave be granted plaintiff to redeem said lands by paying whatever is found to be due to such of the defendants as may be entitled to it. Possession of

the lands is also sought, as well as an accounting of the rents, issues and profits thereof. It is further asked that a receiver be appointed to take charge of said lands and preserve the same, and that defendant Yolo Water and Power Company be enjoined from doing certain contemplated work thereon. A number of other averments of the complaint are omitted from this statement because they have no bearing upon the question to be determined at this time. This question arises upon a motion to dismiss the bill upon several grounds, the one chiefly insisted upon being that the court is without jurisdiction because the suit is one upon a chose in action and as the Central Counties Land Company, because a citizen of this State, could not maintain the action [22] in this court, neither can plaintiff, its successor, do so, although a citizen of another state. This brings up for consideration the following provisions of Section 24 of the Judicial Code:

“No District Court shall have cognizance of any suit \* \* \* \* to recover upon any promissory note or other chose in action in favor of any assignee, \* \* \* \* unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made.”

It is strongly urged that this is not a suit upon a chose in action but is a suit to quiet title. However the action may be denominated, it seems quite clear to me, that what is sought here is the enforcement of the original contract between the Central Counties Land Company and the Capay Ditch Company, and

the rights asserted are based wholly thereon.

The Court is asked to declare the instrument, in form a deed, to be a mortgage, and to do this because the parties agreed that it was such. If it were not for this agreement plaintiff would have no cause of action against defendants. This agreement is a chose in action, and this suit being to recover upon it, falls within the terms of Section 24 above quoted, and cannot be maintained.

The motion to dismiss will, therefore, be granted.  
March 10th, 1914.

M. T. DOOLING,  
Judge.

[Endorsed]: Filed Mar. 10, 1914. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [23]

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At a stated term, to wit, the March term, A. D. 1914, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the court-room in the City and County of San Francisco, on Tuesday, the 10th day of March, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable MAURICE T. DOOLING, District Judge.

EQUITY—15.

POWER & IRRIGATION CO. OF CLEAR LAKE

vs.

L. D. STEPHENS et al.

**Order Granting Defendants' Motion to Dismiss Bill.**

Defendants' motion to dismiss the bill, heretofore heard and submitted, being now fully considered and the Court having filed its opinion thereon, it was ordered that said motion be and the same is hereby granted. [24]

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*In the District Court of the United States for the  
Northern District of California, Second Di-  
vision.*

EQUITY—15.

POWER AND IRRIGATION COMPANY OF  
CLEAR LAKE, a Corporation,

Plaintiff,

vs.

L. D. STEPHENS, YOLO POWER & WATER  
COMPANY, a Corporation, et al.,

Defendants.

**Decree.**

This matter came on to be heard on the 24th day of January, 1914, upon a motion made by the defendants to dismiss plaintiff's bill of complaint upon the ground that the above-entitled court is without jurisdiction to hear and determine the said cause; thereupon the said motion was argued by counsel for the respective parties, and submitted to the court for its decision, and all and singular, the premises having been duly considered by the Court, and it appearing that the said Court is without juris-

diction to hear and determine the said cause,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the said bill of complaint and the said cause be and the same are hereby dismissed, and that said defendants recover their costs herein, taxed at the sum of \$5.90.

M. T. DOOLING,  
Judge of said Court.

[Endorsed]: Filed and entered March 24, 1914.  
Walter B. Maling, Clerk. By J. A. Schaertzer,  
Deputy Clerk. [25]

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*In the District Court of the United States for the  
Northern District of California, Second Di-  
vision.*

No. 15.

POWER AND IRRIGATION COMPANY OF  
CLEAR LAKE, a Corporation,

Plaintiff,

vs.

L. D. STEPHENS and YOLO WATER AND  
POWER COMPANY, a Corporation Organ-  
ized and Existing Under the Laws of the State  
of California,

Defendants.

**Petition for Order Allowing Appeal and Order  
Allowing Appeal.**

To the Honorable Court Above Entitled:

The above-named plaintiff, Power and Irrigation Company of Clear Lake, a corporation, considering

itself aggrieved by the decree made and entered in the above-entitled court on the 24th day of March, 1914, in the above-entitled cause, hereby appeals therefrom to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, for the reasons and upon the grounds specified in its Assignment of Errors filed herewith, and prays that this appeal may be allowed; and that a transcript of the record, proceedings, and papers upon which said decree was made and entered as aforesaid, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, sitting at San Francisco, California.

And your petitioner further prays that the proper order touching the security to be required of it to perfect its said appeal, be made.

CHARLES S. WHEELER and  
JOHN F. BOWIE,

Solicitors for Plaintiff. [26]

**Order Allowing Appeal [and Fixing Amount of Bond].**

The foregoing Petition for Appeal is hereby granted, and the appeal is allowed, upon the petitioner filing a bond in the sum of Three Hundred Dollars (\$300.00), to be conditioned as required by law.

Dated September 23, 1914.

M. T. DOOLING,  
Judge.

[Endorsed]: Filed September 23d, 1914. Walter  
B. Maling, Clerk. [27]

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*In the District Court of the United States, for the  
Northern District of California, Second Di-  
vision.*

No. 15—EQUITY.

POWER AND IRRIGATION COMPANY OF  
CLEAR LAKE, a Corporation,

Plaintiff,

vs.

L. D. STEPHENS, and YOLO WATER AND  
POWER COMPANY, a Corporation Organ-  
ized and Existing Under the Laws of Califor-  
nia,

Defendants.

**Assignment of Errors on Appeal.**

Now comes the plaintiff in the above-entitled action by its attorneys, Charles S. Wheeler and John F. Bowie, and avers that the decree entered in the above-entitled cause on the 24th day of March, 1914, is erroneous and unjust to the plaintiff, and files with its petition for an appeal from the said decree, the following Assignment of Errors, and specifies that the decree is erroneous in each and every of the following particulars, viz.:

1. The said District Court of the United States for the Northern District of California was not without jurisdiction to hear and determine the said cause, and the order, judgment, and decree of said Court

dismissing said bill for want of jurisdiction is therefore erroneous.

2. The said Court erred in holding that Section 24 of the Judicial Code deprived it of jurisdiction in the above-entitled action, forasmuch as the provisions of said Section 24 are not applicable to the case at bar.

3. The said Court erred in holding that plaintiff's cause of action is based upon a chose in action within the meaning [28] of that phrase as used in Section 24 of the Judicial Code, forasmuch as plaintiff's cause of action is not based on a chose in action within the meaning of the phrase as used in Section 24 of the Judicial Code, but is an action to remove a cloud from title and to redeem from a mortgage.

4. The Court erred in holding that plaintiff is the assignee of a mere chose in action as regards the lands described in the bill, forasmuch as the title to the lands in question is shown by said bill to be presently vested in the plaintiff.

5. The Court erred in holding that the bill seeks the enforcement of the original contract between the Central Counties Land Company and L. D. Stephens, forasmuch as such is not the gravamen of plaintiff's cause of action.

6. The Court erred in holding that the rights asserted in the action are based wholly upon the original contract between the Central Counties Land Company and L. D. Stephens; whereas, the fact is, that the rights and equities relied on in the bill arise out of the circumstances that by mandate of express law no title passed under the indenture set forth in the bill.

WHEREFORE, the plaintiff prays that the said decree be corrected or reversed, and the District Court directed to deny said Motion to Dismiss, or that such other relief be awarded as the nature of the case demands.

CHARLES S. WHEELER and  
JOHN F. BOWIE,  
Attorneys for Plaintiff.

[Endorsed]: Filed Sept. 23d, 1914. Walter B.  
Maling, Clerk. [29]

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*In the District Court of the United States, for the  
Northern District of California, Second Di-  
vision.*

No. 15—EQUITY.

POWER AND IRRIGATION COMPANY OF  
CLEAR LAKE, a Corporation,

Plaintiff,

vs.

L. D. STEPHENS and YOLO WATER AND  
POWER COMPANY, a Corporation Organ-  
ized and Existing Under the Laws of Califor-  
nia,

Defendants.

**Bond on Appeal.**

KNOW ALL MEN BY THESE PRESENTS,  
That we, Power and Irrigation Company of Clear  
Lake, as principal, and Pacific Coast Casualty Co.,  
as surety, of the City and County of San Francisco,  
State of California, are held firmly bound unto L.  
D. Stephens and Yolo Water and Power Company,

a corporation, in the sum of \$300.00 lawful money of the United States, to be paid to them and their respective executors, administrators, and successors and assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our successors and assigns, by these presents.

Sealed with our seals and dated this 23d day of September, 1914.

WHEREAS, the above-named Power and Irrigation Company of Clear Lake has obtained an appeal to the Circuit Court of Appeals of the United States to correct or reverse the decree of the District Court for the Ninth District of California, in the above-entitled cause. [30]

NOW, THEREFORE, the condition of this obligation is such that if the above-named Power and Irrigation Company of Clear Lake shall prosecute its said appeal to effect and answer all costs if it fails to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

POWER AND IRRIGATION COMPANY  
OF CLEAR LAKE.

By H. S. ELLIOTT,  
President.

By R. H. BORLAND,  
Secretary.

[Seal Power and Irrigation Co.]

PACIFIC COAST CASUALTY COMPANY.

By R. W. STEWART,  
Attorney in Fact.

[Seal Pacific Coast Casualty Co.]

Approved September 23d, 1914.

M. T. DOOLING,  
Judge.

[Endorsed]: Filed Sept. 23d, 1914. Walter B.  
Maling, Clerk. [31]

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*In the United States District Court for the Northern  
District of California, Second Division.*

EQUITY—No. 15.

POWER AND IRRIGATION COMPANY OF  
CLEAR LAKE, a Corporation,

Plaintiff,

vs.

L. D. STEPHENS and YOLO WATER AND  
POWER COMPANY, a Corporation Organ-  
ized and Existing Under the Laws of the State  
of California,

Defendants,

**Praecipe for Transcript on Appeal.**

To the Clerk of Said Court:

Sir: Please make up, print, and issue in the above-entitled cause a certified transcript of the record, upon an appeal allowed in this cause, to the Circuit Court of Appeals of the United States for the Ninth Circuit, sitting at San Francisco, California, the said transcript to include the following:

Bill to Redeem;

Motion to Dismiss Bill of Complaint;

Notice of Hearing Motion to Dismiss Bill of Com-  
plaint;

Memorandum Decision;  
Opinion of the Court (Dooling, J.) in action No.  
14—Equity;  
Minute Order of Tuesday, March 10, 1914;  
Decree Dismissing Bill;  
Petition for Allowance of Appeal, and Order En-  
dorsed Thereon;  
Assignment of Errors on Appeal;  
Citation on Appeal;  
Bond on Appeal;  
Praceipe for Transcript.

You will please transmit to the Circuit Court of Appeals, [32] with the record to be prepared as above, the Original Citation on Appeal.

CHARLES S. WHEELER and  
JOHN F. BOWIE,  
Solicitors for Appellant.

Service and receipt of a copy of the within Praecipe this 23d day of September, 1914, is hereby admitted.

MASTICK & PARTRIDGE,  
A. E. SHAW,  
BERT SCHLESINGER,  
DENSON, COOLEY & DENSON,  
Attorneys for Defendants.

[Endorsed]: Filed Sep. 23, 1914. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [33]

*In the District Court of the United States, in and  
for the Northern District of California.*

No. 15—EQUITY.

POWER AND IRRIGATION COMPANY OF  
CLEAR LAKE, a Corporation,

Plaintiff,

vs.

L. D. STEPHENS and YOLO WATER AND  
POWER COMPANY, a Corporation, etc.,  
Defendants.

**Clerk's Certificate to Record on Appeal.**

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing thirty-three (33) pages, numbered from 1 to 33, inclusive, to be full, true and correct copies of the records and proceedings as enumerated in the praecipe for transcript of record, as the same remain on file and of record in the above-entitled cause, and that the said constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is \$21.80; that said amount was paid by Charles S. Wheeler and John F. Bowie, Esqs., Attorneys for Plaintiff; and that the original Citation issued in said cause is hereto annexed.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court, this 21st

day of October, A. D. 1914.

[Seal]

WALTER B. MALING,  
Clerk.  
By J. A. Schaertzer,  
Deputy Clerk. [34]

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*In the United States Circuit Court of Appeals for  
the Ninth Judicial Circuit.*

POWER AND IRRIGATION COMPANY OF  
CLEAR LAKE, a Corporation,

Plaintiff and Appellant,  
vs.

L. D. STEPHENS and YOLO WATER AND  
POWER COMPANY, a Corporation Organ-  
ized and Existing Under the Laws of the State  
of California,

Defendants and Appellees.

**Citation on Appeal [Original].**

United States of America,—ss.

The President of the United States, to L. D. Stephens and Yolo Water and Power Company, a Corporation Organized and Existing Under the Laws of the State of California, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, on the 22 day of October, 1914, being within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the District Court of

the United States for the Northern District of California, in the suit numbered 15, in the records of said court, wherein Power and Irrigation Company of Clear Lake, a corporation, is plaintiff and appellant, and you and each of you are defendants and appellees, to show cause, if any there be, why the decree rendered against the said plaintiff and appellant, as in said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf. [35]

WITNESS, the Honorable M. T. DOOLING, United States Judge for the Northern District of California, this 23 day of September, 1914.

M. T. DOOLING,

Judge. [36]

Service and receipt of a copy of the within Citation this 23d day of September, 1914, is hereby admitted.

MASTICK & PARTRIDGE,

A. E. SHAW,

BERT SCHLESINGER,

DENSON, COOLEY & DENSON,

Attorneys for Defendants.

[Endorsed] : No. 15. In the United States Circuit Court of Appeals for the Ninth Circuit. Power and Irrigation Company of Clear Lake, a Corporation, Plaintiff and Appellant, vs. L. D. Stephens et al., Defendants and Appellees. Citation on Appeal. Filed Sep. 23, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 2501. United States Circuit Court of Appeals for the Ninth Circuit. Power and Irrigation Company of Clear Lake, a Corporation, Organized and Existing Under the Laws of the State of Arizona, Appellant, vs. L. D. Stephens and Yolo Water and Power Company, a Corporation, Organized and Existing Under the Laws of the State of California, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Second Division.

Filed October 21, 1914.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,

Deputy Clerk.



IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT.

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POWER AND IRRIGATION COMPANY OF CLEAR  
LAKE, a Corporation, organized and existing under the  
laws of the State of Arizona,

Appellant,

vs.

L. D. STEPHENS and YOLO WATER AND POWER  
COMPANY, a Corporation, organized and existing under  
the laws of the State of California,

Appellees.

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**BRIEF OF APPELLANT.**

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CHARLES S. WHEELER and  
JOHN F. BOWIE,

Attorneys for Appellant.

HARDING & MONROE,  
Of Counsel.

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Filed this ..... day of March, 1915.

F. D. MONCKTON, Clerk,

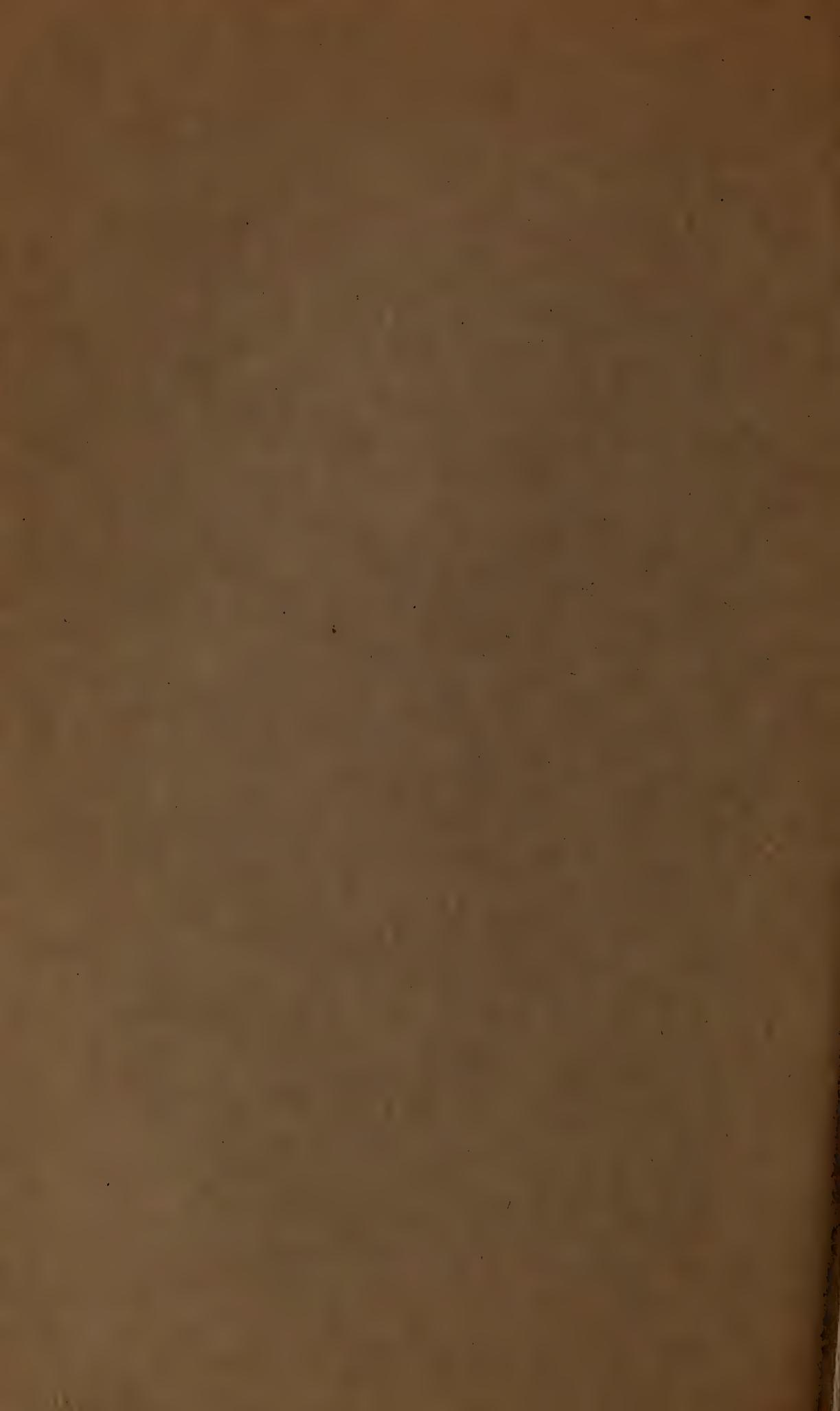
By ..... , Deputy Clerk.

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MAR 2 - 1915

U. S. GOVERNMENT PRINTING OFFICE



IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

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POWER AND IRRIGATION COMPANY OF CLEAR LAKE, a corporation, organized and existing under the laws of the State of Arizona,

*Appellant,*

vs.

} No. 2501.

L. D. STEPHENS and YOLO WATER AND POWER COMPANY, a corporation, organized and existing under the laws of the State of California,

*Appellees.*

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BRIEF OF APPELLANT.

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STATEMENT OF FACTS.

This is an appeal from a decree dismissing appellant's bill for want of jurisdiction.

Appellant is a citizen of Arizona. The appellees are both citizens of California. The court below was

of opinion that the suit was brought by appellant as an assignee to recover on a *chose in action*, and that since the assignor, a citizen of California, could not have maintained the suit, neither could the appellant (Tr., pp. 26-27).

The facts in this case are somewhat different from the facts involved in Appeals Nos. 2500 and 2502, in that there mortgages by deed absolute were involved while here we have a resulting trust as well.

On October 10, 1906, Mary B. Collier and her husband agreed to sell certain lands to one Shuman (Tr., p. 2).

On May 7, 1907, Shuman assigned the contract to California Industrial Company (Tr., p. 7).

On the same day said Mary B. Collier and her husband entered into an agreement with said California Industrial Company which was supplemental to the said agreement of October 10, 1906 (Tr., p. 7).

Both of the foregoing agreements were thereafter assigned to Central Counties Land Company (Tr., p. 13).

Said Central Counties Land Company and its predecessors performed all of the covenants contained in said agreements until it came time for the final payment. They had paid \$15,500 principal and \$1250 interest. Seven thousand dollars remained to be paid (Tr., pp. 13-14).

Said Central Counties Land Company applied to appellee Stephens for the loan of \$7000.00 with which

to make the last payment. He consented. The said contracts with the Colliers were assigned to him. He paid to the Colliers the money and took a deed direct from them (Tr., p. 16), it having been previously arranged that when this was done he should hold the title as security (Tr., p. 15).

The Central Counties Land Company had entered into possession under the Collier agreements and its tenant was in possession at the time of the deed from the Colliers to said Stephens, and after the deed was made said Central Counties Land Company continued in possession by their tenant. Their tenant did not attorn to said Stephens (Tr., p. 16).

This continued until November 1st, 1911. Meanwhile divers sums were paid by said Central Counties Land Company to Stephens on account of the principal and interest of the loan. Since November 1st, 1911, the appellees have collected the rents (Tr., p. 16).

On that date Stephens was indebted to the Central Counties Land Company in an amount in excess of the loan (Tr., p. 17; see also p. 18).

Stephens has executed an instrument purporting to convey the said lands to appellee Yolo Water and Power Company. The latter had full knowledge of all of the facts (Tr., p. 19).

The prayer is for a decree that plaintiff is the owner of the property and is entitled to be let into possession

upon paying to Stephens or his assigns anything ascertained to be due, and for general relief.

That the learned judge of the court below erred in holding the action to be one to "recover upon a chose in action" is, we think, clear beyond all question.

**THE ACTION WAS TO ESTABLISH A RESULTING TRUST—NOT TO RECOVER UPON A CHOSE IN ACTION.**

A. That this is true will be clear from the following quotations:

"When the defendant loaned the money to plaintiff, Cordelia, it became hers, and its payment to the owners of the lot was a payment of her own money as much so as if she had the money without borrowing it. It seems to us quite clear that defendant held the title as trustee and also, in a sense, as mortgagee, and that upon payment of the loan plaintiffs were entitled to a reconveyance to them of the title by defendant.

"Section 853 of the Civil Code provides: 'When a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made.' . . . The Court found that the consideration was paid by and for the plaintiffs, and, although the deed was made to defendant in part as security, a trust nevertheless resulted 'in favor of the person by or for whom such payment is made.' And such a trust—by operation of law—may be created. (Civil Code, Sec. 853.) . . . This (case) is essentially the enforcement of a resulting trust, and the statute of limitations invoked by defendant has no application."

*Whitehouse v. Whitehouse*, 22 Cal. App., 565, 567-8.

"The rule is familiar that when, upon a purchase of real property, the purchase-money is paid by one person and the

conveyance is made to another, a resulting trust immediately arises against the person to whom the land is conveyed, in favor of the one by whom the purchase-money is paid. The real purchaser of the property is considered as the owner, with the right to control the title in the hands of the grantee and to demand a conveyance from him at any time. The same rule prevails if the money paid by the party taking the title is advanced by him as a loan to the other, and the conveyance is made to the lender for the purpose of securing the loan. But in the latter case the purchaser cannot demand the conveyance until he has paid the money advanced, and for which the land is held as security. In such a case the grantee holds a double relation to the real purchaser; he is his trustee of the legal title to the land and is mortgagee for the money advanced for its purchase, and, as in the case of any other mortgage which is evidenced by an absolute deed, is entitled to retain the title until the payment of the claim for which it is held as security."

*Campbell v. Freeman*, 99 Cal., 546, 547-8.

See to like effect:

*Thomas v. Jameson*, 77 Cal., 91, 93;

*Hellman v. Messmer*, 75 Cal., 166, 170;

*Walton v. Karnes*, 67 Cal., 255.

The trust arises in this case by operation of law. The parties agreed according to the bill to do the very things that the law would in the absence of such agreement have required of them. This does not alter the legal effect of the transaction or convert the suit into an action to specifically enforce the agreement. The following quotations make this clear:

"But the appellant contends that there being a special agreement between the parties, this constitutes an *express* trust, as contradistinguished from the *implied or resulting* trust, which arises by implication from the payment of the consideration money; . . . There was no agreement, in

terms, that the defendant should hold the property in trust for the plaintiffs, which would seem to be necessary to create an *express* trust; but from the facts that the purchase was made with the money of the plaintiffs, and the conveyance made to the defendant, the law implies that the title thus conveyed is held in trust for the person furnishing the money, and thus the trust is created by operation of law. *The fact that the defendant agreed by parol to do what the law would compel him to do—that is, hold the title subject to the rights of the plaintiffs, and convey to them upon demand after a certain time, makes the trust none the less a trust created by operation of law.*"

*Bayles v. Baxter*, 22 Cal., 575, 578-9.

"The fact that the parties agreed verbally to do that which the law implies from their acts did not in any wise affect the character of the transaction as a trust created by operation of law."

*Gerety v. O'Sheehan*, 9 Cal. App., 447, 450.

"The averment of exactly the verbal agreement which, in the absence of any contract the law would imply, would not alter the nature of the action. (*Bayles v. Baxter*, 22 Cal., 578; *Gerety v. O'Sheehan*, 9 Cal. App., 447; 99 Pac., 546; *Faylor v. Faylor*, 136 Cal., 93; 68 Pac., 482.)"

*Breitenbucher v. Oppenheim*, 160 Cal., 98, 102.

We have, then, a suit to establish a resulting trust, and to compel the trustee to convey upon receiving the amount of the purchase price advanced by him.

B. That such a suit is not to recover upon a chose in action, and that a suit by the grantee of the holder of the equitable title is not a suit by an *assignee* to recover upon a chose in action is clear beyond question.

There are not many cases in the books that say this

in express terms, to be sure. It seems likely that it seldom has happened that the full equitable title of the beneficiary under a resulting trust has been supposed to be a chose in action. However, such a case did arise in this Circuit, and the Court said:

"It is now objected that the plaintiff is simply the assignee of a contract or contracts for the title to, or interest in, real property; and, as it does not appear that all the assignors could have maintained this suit on the ground of their citizenship, he cannot do so. . . .

". . . the bill alleges that since May 4, 1874, the plaintiff Gest, 'by a regular chain of conveyances and assignments,' has acquired 'all the right, title, and interest' which Rice and Clark, Layton & Co. then had in said property, or the rents, issues, and profits thereof. This being so, he is the owner of the property in equity, subject to the lease made to Carter and Packwood. The legal title was wrongfully obtained by the latter after their sale to Rice, and they hold the same in trust for their vendee. A sale and conveyance of the property to Gest under such circumstances, or of all the right, title, and interest of Rice and Clark, Layton & Co. therein, *is the sale and conveyance of the beneficial interest in the property*, and not the mere assignment of a right of action thereabout."

*Gest v. Packwood*, 39 Fed., 525, 537.

Such grantee holds a title—an estate in the land. The holder of the legal title is injuring him—the true owner, every day by withholding from him the legal title. It is not an injury to the grantor. The grantor did not assign an action for this injury. It is a direct injury to the title that is complained of. Analogous cases are numerous enough.

A deed to real property has never been consid-

ered to be a chose in action within the meaning of any of the various judiciary acts of the United States.

In *Briggs v. French*, 4 Fed. Cas., 119, it is said:

"Now, the exception extends to promissory notes and choses in action. The present suit is not founded upon either. *It is founded upon a conveyance of a title to land*, good (as far as appears) by the *lex loci situs* . . . The words, then, of the exception do not apply to the case. It is a case within the general descriptive words as to suitors, founding the jurisdiction of the circuit court."

Similarly, it was said in *Sheldon v. Sill*, 8 How., 449, 450:

"The only remaining inquiry is, whether the complainant in this case is the assignee of a 'chose in action' within the meaning of the statute. . . . The term 'chose in action' is one of comprehensive import. . . . It is true, *a deed of title for land does not come within this description.*"

In Ohio the law was that the title passed under a mortgage, and it was said, after holding the mortgage to be a conveyance of the title:

"A conveyance of land is not a chose in action . . . That the statute acts upon negotiable paper is clear. . . . *That it does not act on conveyances of real estate, either equitably or legally, would seem to be undoubted.*"

*Dundas v. Bowler*, 8 Fed. Cas., 28, 29.

A like decision is *Smith v. Kernochan*, 7 How., 216:

"The conveyance by the marshal under the receivership proceedings . . . can hardly be considered merely as an assignment of the original contract under which the

plant was erected. *It was a conveyance of real estate.* . . . There does not seem to be any likeness in the case to that of the assignee of a promissory note or other chose in action."

*Portage City Water Co. v. City of Portage,*  
102 Fed., 769, 774.

The foregoing considerations establish our contention that appellant is not the assignee of a chose in action, and that the bill is not brought to recover upon a chose in action. It follows that since the requisite diversity of citizenship appears, the District Court has jurisdiction and the decree dismissing the bill must be reversed.

#### A SECOND GROUND FOR REVERSAL.

It is to be noted before closing, that there is also another ground for upholding the jurisdiction, viz:

The transaction pleaded not only created a resulting trust, but it converted the deed also into a mortgage. (So held in *Campbell v. Freeman*, 99 Cal., 548, and many other cases.) As was held in said Campbell case at p. 348, the result is the same whether the conveyance is made by a vendor direct to the person who loans the money with which the vendee makes the purchase or makes it to the vendee, who in turn deeds to the lender of the money to secure the loan.

This being the law, the case is brought directly into line with the issue involved in two appeals now

before this Honorable Court, numbered respectively 2500 and 2502; for in said two cases, mortgages by deeds absolute are involved. What is said in the briefs filed by this appellant in said appeals is therefore pertinent to this case also, and we respectfully refer to said briefs and beg leave to make the discussion of the jurisdictional questions therein contained a part hereof. From the authorities cited in said discussion, as well as from what is set forth hereinabove, we respectfully submit that the jurisdiction of the District Court to entertain this cause is perfectly clear.

Respectfully submitted.

CHARLES S. WHEELER and  
JOHN F. BOWIE,  
Attorneys for Appellant.

HARDING & MONROE,  
Of Counsel.

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

POWER AND IRRIGATION COMPANY OF CLEAR  
LAKE, a corporation organized and  
existing under the laws of the State of  
Arizona,

*Appellant,*

vs.

L. D. STEPHENS and YOLO WATER AND  
POWER COMPANY, a corporation organ-  
ized and existing under the laws of the  
State of California,

*Appellees.*

## BRIEF FOR APPELLEES.

S. C. DENSON,  
JOHN S. PARTRIDGE,  
ALAN C. VAN FLEET,

*Attorneys for Appellees.*

*Filed*

MAR 10 1915

Filed this..... day of March, 1915.

*F. D. Monckton,*

*FRANK D. MONCKTON, Clerk.*

By..... Deputy Clerk.



No. 2501

IN THE

**United States Circuit Court of Appeals**  
**For the Ninth Circuit**

---

POWER AND IRRIGATION COMPANY OF CLEAR  
LAKE, a corporation organized and  
existing under the laws of the State of  
Arizona,

*Appellant,*

vs.

L. D. STEPHENS and YOLO WATER AND  
POWER COMPANY, a corporation organ-  
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State of California,

*Appellees.*

---

**BRIEF FOR APPELLEES.**

---

**Statement of Facts.**

In 1906, the Colliers (husband and wife) agreed to sell certain lands in Lake County, California, to one Shuman. In 1907 Shuman assigned the contract to the California Industrial Company. Thereafter the contract was assigned to the Central Counties Land Company, hereinafter referred to as the Land Company. The Land Company and its predeces-

sors paid all but \$7000 of the purchase price. The Land Company then applied to the appellee Stephens for a loan of \$7000. Stephens agreed to loan the Land Company this sum, if the Land Company would assign him its rights under its contract and procure a conveyance of the land to him by the Colliers as security for the repayment of the loan. Accordingly Stephens paid the Colliers \$7000 and the Colliers *conveyed the land to him*. The Land Company assigned its rights under the contract to Stephens and *Stephens agreed to convey the land to said Company on repayment of the said loan, said payment to be made to Stephens on demand* (Tr. pp. 15-16).

In short, the situation is this: The Land Company, a California corporation, holds a contract for the purchase of certain lands from the Colliers. The Land Company borrows money from Stephens, a resident of California, to complete the purchase. It is agreed between the Land Company and Stephens that Stephens will take a deed to the said property as security for the repayment of the loan. Stephens agrees to convey the land to the Land Company when he is repaid his loan.

This is the situation in 1913. On April 9, 1913, the Power and Irrigation Co. of Clear Lake, appellant herein, is organized as an *Arizona corporation*. The Central Counties Land Co., a *California corporation*, assigns its rights under the contract with Stephens to the Arizona corporation, and on April

25, 1913, the above entitled action is commenced in the lower Court.

In fairness to appellant it should be stated that the precise character of the transaction whereby the appellant herein acquired any right of action against Stephens is thus set forth in the complaint (Tr. pp. 9, 19) as follows:

“That prior to the commencement of this action, the said Board of Directors of said defunct corporation, Central Counties Land Company, acting as Trustees for the benefit of the creditors and stockholders of said defunct corporation, duly sold, assigned, transferred and conveyed unto the plaintiff, above named, the aforesaid lands, and the full equitable title thereto has by mesne conveyances become vested in this plaintiff, and that plaintiff is now the lawful owner and holder thereof.”

It is clear, however, that the land itself had been conveyed by the Colliers to Stephens, and while he held it merely as security, nevertheless, all that the Central Counties Land Co. could convey to the appellant were its *rights* under the contract with Stephens. The plaintiff, appellant here, if it can recover at all, can only recover *as the assignee* of the Central Counties Land Co. Surely the plaintiff is an assignee seeking to recover upon a chose in action, which chose in action is based on a contract, and it must therefore follow that since its assignor could not maintain this action, plaintiff cannot.

## Argument on the Law.

### I.

THE ACTION IS ONE TO REDEEM PROPERTY UNDER A CONTRACT OF MORTGAGE. IT IS CLEAR THAT SUCH AN ACTION FALLS WITHIN THE EXPRESS INHIBITION OF SECTION 24 OF THE JUDICIAL CODE.

Section 24 of the Judicial Code is as follows:

“No District Court shall have cognizance of any suit \* \* \* to recover upon any promissory note or other chose in action in favor of an assignee unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made.”

The mischief which the statute was aimed to prevent was the colorable and collusive assignment, sale or transfer of the subject matter of a suit made for the mere purpose of conferring jurisdiction on the Federal Courts. In this particular case, the rule should apply with peculiar force, because it is evident that the Arizona corporation, formed less than a week before this suit was commenced, was organized for the express purpose of maintaining these actions in the Federal Court.

The Federal Courts early defined broadly the scope of the term “chose in action”. The Judiciary Acts of 1789 and 1887-8 prohibited the Federal Courts from having “cognizance of any suit, except foreign bills of exchange, to recover the *contents* of any promissory note or other *chose in action* in

favor of an assignee", unless the suit might have been prosecuted in such court by the assignor.

Section 24 of the Judicial Code is of comparatively recent enactment. Instead of denying an assignee the right to recover "*the contents of a chose in action*" where his assignor could not do so, we have the Judicial Code denying the assignee the right to "recover upon a chose in action". We think that this new language of the Judicial Code should be kept in mind throughout this discussion. It should be remembered that we are not now dealing with the words "contents of a chose in action" which would imply a subsisting contract having contents capable of recovery, but we are simply dealing with the words "to recover upon a chose in action".

It was evidently the intent of those who drafted the Judicial Code to get away from the troublesome phrase "contents of a chose in action" and substitute "chose in action", a term of wider and more comprehensive scope.

The Supreme Court of the United States, discussing the scope of the Judiciary Act of 1789 in the case of *Bushnell v. Kennedy*, 76 U. S. 390, 19 L. ed. 736 (1870) defines "chose in action" as follows:

"That the indebtedness here was a chose in action cannot be doubted for under that *comprehensive description* are included all debts, all claims for damages for breach of contract, or for torts connected with contracts."

But one limitation on the scope of the term "chose in action" is apparent in the decisions. The "chose

in action" embraced by the statute is a right of action arising *ex contractu* (from contract) not one arising *ex delicto* (from wrong or tort). This limitation was early enunciated by the Circuit Court in the case of *Simons v. Ypsilanti Paper Co.*, 33 Fed: 193, which has become a leading case on this subject.

The language of the court is as follows:

"In Sheldon v. Sill, 8 How. 441, a bill in equity to foreclose a mortgage was held to be a suit to recover the contents of a chose in action, and not maintainable by an assignee who had taken title from a citizen of the same state as defendant. Mr. Justice Grier observed that the term 'chose in action' was one of comprehensive import; 'it includes the infinite variety of contracts, covenants and promises which confer on one party a right to recover a personal chattel, or sum of money from another by action.' That the court subsequently receded from a portion of this language is evident from the case of Deshler v. Dodge, 16 How. 622, in which an action of replevin was held not to be within the exception of the statute. The court held that the phrase 'right to recover a personal chattel' used in the opinion in Sheldon v. Sill, *was not intended to authorize a recovery in specie or damages for a tortious injury to property*, but a remedy on the contract for the breach of it, whether such contract was for the payment of money or the delivery of a personal chattel."

And again:

"The court takes an obvious and clear distinction between rights of action founded upon contracts—which contracts contain within themselves some promise or duty to be performed—and mere naked rights of action founded upon

some wrongful act—some neglect or breach of duty to which the law attaches damages. ‘A suit,’ says Judge Shipman, ‘to compel the performance of that promise or duty by securing to the plaintiff that which is withheld by the defendant is a suit to recover the contents of a chose in action;’ but a mere right of action to recover damages imposed by law for delinquency is not within the prohibition of the statute, and the objection to the jurisdiction fails.”

Turning now to the facts of the case at bar and applying the principles which the Federal Courts have laid down for our guidance, it is clear that this action is one to recover “upon a chose in action” as that term is aptly defined in *Bushnell v. Kennedy, supra*, and it is clear that the chose in action is one arising *ex contractu* and not *ex delicto*.

We are concerned with an action wherein the Power and Irrigation Co. seeks to redeem land held by Stephens under a mortgage.

“Mortgage is a *contract* by which specific property is hypothecated for the performance of an act, without the necessity of a change of possession.”

Civil Code of Cal., Sec. 2900.

An action to redceem property from a mortgage is an action by a mortgagor to enforce the mortgagee to fulfill his obligation to return the security on payment of the debt it was given to secure. It is an action to *specifically enforce the mortgagee's contract*. A mere statement of the situation seems to lead incontrovertibly to the conclusion that we

are here concerned with an action "upon a chose in action" arising *ex contractu* and that such an action comes within the express prohibition of the statute is too clear for argument.

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## II.

### **THE APPELLANT FIRST MAINTAINS THAT THE ACTION IS ONE TO ESTABLISH A RESULTING TRUST—NOT TO RECOVER UPON A CHOSE IN ACTION.**

In support of this contention, appellant relies in part on the following cases:

*Bayles v. Baxter*, 22 Cal. 575;

*Gerety v. O'Sheehan*, 9 Cal. App. 448; and

*Breitenbucher v. Oppenheim*, 160 Cal. 98.

These are all cases where one person pays the consideration money for the purchase of land and the conveyance is made to another, and the court decides that the latter holds the title in trust for the person who pays the consideration. The decisions in these cases involved the right of the equitable owner to compel a conveyance by the person holding the bare legal title. The Court, in each case applied the rule laid down in Sec. 853 of the Civil Code of California, which provides that:

"When a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made."

In the case at bar, however, we are not concerned with such cases. The Civil Code of California has wisely provided for a remedy in a case of the character above described, so that the person holding the property as trustee may be compelled to convey, despite the Statute of Frauds, Statute of Limitations and similar defenses. For the protection of parties to such a transaction, the law provides a resulting trust.

But these cases are not the case at bar. Here we have a case where one having a contract entitling him to the conveyance of certain land, borrows money from another to pay the purchase price, and has the owner of the land convey it to the lender to secure him for the borrower's debt. This transaction is embodied in an express contract. It is an ordinary case of mortgage, except that the borrower procures another to supply the security.

At least two of the cases cited by appellant so define this proceeding. In *Whitehouse v. Whitehouse*, 22 Cal. App. 565, the gist of the case is aptly set forth in the syllabus:

“Where one person loans money to others with which to purchase real estate, and the title is taken in his name as security, he holds it as a trustee and mortgagee, and they, upon payment of the loan, are entitled to a conveyance from him.”

The case of *Campbell v. Freeman*, 99 Cal. 546, involved a situation where the purchaser of the property borrowed money to complete the purchase, and

the owner conveyed directly to the lender for the purpose of securing the loan. The Court discussed the rights of the parties in the following language:

“In such a case the grantee holds a double relation to the real purchaser, he is his trustee of the legal title to the land and *he is mortgagee for the money advanced for its purchase*, and, as in the case of any other mortgage which is evidenced by an absolute deed, is entitled to retain the title until the payment of the claim for which it is held as security; and he may also enforce his lien by an action of foreclosure. *The conveyance is none the less a mortgage because it was conveyed to him directly by a third party*, to secure his loan to the purchaser for the amount of the purchase money, than if the conveyance had been made directly to the purchaser in the first instance, and the purchaser had then made a conveyance to him as a security for the money that he had previously borrowed, with which to make the purchase.”

The cases of *Thomas v. Jameson*, 77 Cal. 91; *Hellman v. Messer*, 75 Cal. 166, and *Walton v. Karnes*, 67 Cal. 255, are of like effect.

The appellant contends that it is seeking to establish a resulting trust, but as seen by the language of the Court in *Campbell v. Freeman*, supra, it is in reality seeking to redeem from a mortgagee. The fact that the Court in their discussions of the above cases saw fit to invoke section 853 of the Civil Code of California, and talk about “resulting trusts” does not alter the true status of the parties. The true status in which we find the appellant and the appellee Stephens is that of mortgagor and mort-

gagee, the former seeking to enforce his equity of redemption.

It seems perfectly clear then, that appellant is seeking to "recover upon a chose in action" arising out of a contract. His right is one which is recognized by the equity side of the District Court. The fact that his rights arising out of contract may be equitable in character does not change the application of Section 24 of the Judicial Code. That this statement is true will be clear from the case of *Wilkinson v. Wilkinson*, 29 Fed. Cas. No. 17,677, not unlike the case at bar in its salient features.

In this case the mortgagor assigned his equity of redemption to the plaintiff. The defendant mortgagee, had foreclosed his mortgage, satisfied his claim and held the excess. This was a bill by the assignee of the mortgagor against the mortgagee. The mortgagor and mortgagee were both residents of the same state, the assignee a nonresident. The Court dismissed the bill, saying:

"I am of opinion that an *equitable assignee* of a claim to an account is within this restrictive clause. In *Sere v. Pilot*, 6 Cranch (10 U. S.) 335, Mr. Chief Justice Marshall, speaking of a suit in equity by an assignee for an account, says: Without doubt, assignable paper, being the chose in action most usually transferred, was in the minds of the legislature when the law was framed; and the words of the provision are, therefore, best adapted to that class of assignments. But there is no reason to believe that the legislature were not equally disposed to except from the jurisdiction of the federal courts, those who could sue in virtue of *equi-*

*table assignments* and those who could sue in virtue of legal assignments. The assignee of all the open accounts of a merchant, might, under certain circumstances be permitted to sue in equity, in his own name, and there would be as much reason to exclude him from the federal courts, as to exclude the same person, when the assignee of a particular note. The term '*other chose in action*' is broad enough to comprehend either case, and the word '*contents*' is too ambiguous to restrain that general term. The contents of a note are the sum it shows to be due; and the same may, without much violence to language, be said of an account.

No substantial distinction in this respect can be made between a right to an account of sales of mortgaged property, and any other right to an account. They are all choses in action within the meaning of this law. They are rights to recover sums of money by means of suits; and whether the right be legal or equitable, whether the assignment thereof passed a legal title so as to enable the assignee to sue in his own name at law, or only an equitable title to be asserted through the aid of a court of chancery, it was equally the purpose of this restrictive clause to prevent the citizenship of the assignee from enabling him to come into a court of the United States. Such, in general, was the view taken of it by the supreme court, in Sheldon v. Sili, 8 How. (49 U. S.) 441; and which was not modified by Dehsler v. Dodge, 16 How. (57 U. S.) 622 which explained its meaning."

In the case of *Sheldon v. Hill*, 8 How. 441; 12 L. ed. 439, we have the reverse of the case at bar. This was an action by the mortgagee to foreclose and the Court held that an assignee of a bond and mortgage bringing suit in the Circuit Court must show his assignee was competent to sue there.

Just as in that case the plaintiff was an assignee of a "chose in action" within the meaning of the statute, so, by a parity of reasoning is the plaintiff in the case at bar.

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### III.

#### **APPELLANT'S FINAL CONTENTION IS TO THE EFFECT THAT APPELLANT IS NOT THE ASSIGNEE OF A CHOSE IN ACTION, BUT THE GRANTEE OF THE HOLDER OF AN EQUITABLE TITLE.**

Now it may be true that the Central Counties Land Co., as between it and the Colliers, holding as it does a contract to purchase the land, is in equity the owner of the land and therefore has an equitable title thereto. But this in no way affects the relations between the Land Company and the appellee Stephens. As between them, the character of the Land Company's claim to the land is immaterial. The Land Company loaned Stephens \$7000 and Stephens procured a conveyance from the Colliers of the land to secure the repayment of the loan. This was a separate and distinct transaction. When the Land Company invested appellant with its rights, it did not convey to appellant its equitable title in the land. In fact, we may here observe parenthetically that the Land Company *had parted with its equitable title*, for it assigned its rights under the contract of sale with the Colliers to Stephens when it procured the deed of the land. What the Land Company did was to assign to

appellant its rights under its contract of mortgage with Stephens. Therefore, the cases cited on pages 7, 8 and 9 of appellant's brief, which simply affirm the proposition that a grantee of an interest in real estate is not an assignee of a chose in action, are wholly inapplicable.

In conclusion, we respectfully submit that the appellant herein is an assignee seeking to recover upon a chose in action on which its assignor could not maintain an action, and that the judgment of the District Court dismissing plaintiff's complaint for want of jurisdiction was proper and should be affirmed.

Dated, San Francisco,  
March 10, 1915.

S. C. DENSON,  
JOHN S. PARTRIDGE,  
ALAN C. VAN FLEET,  
*Attorneys for Appellees.*

United States  
**Circuit Court of Appeals**  
For the Ninth Circuit.

---

POWER AND IRRIGATION COMPANY OF  
CLEAR LAKE, a Corporation,

Appellant,

vs.

J. M. ADAMSON, L. D. STEPHENS, J. L.  
STEPHENS, JOSEPH CRAIG and YOLO  
WATER AND POWER COMPANY, a Cor-  
poration,

Appellees.

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**Transcript of Record.**

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Upon Appeal from the United States District Court  
for the Northern District of California,  
Second Division.

---

**Filed**

NOV 5 - 1914

**F. D. Monckton,**



United States  
Circuit Court of Appeals  
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POWER AND IRRIGATION COMPANY OF  
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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the United States District Court for the Northern  
District of California.*

POWER AND IRRIGATION COMPANY OF  
CLEAR LAKE, a Corporation,  
Plaintiff,

vs.

J. M. ADAMSON, L. D. STEPHENS, J. L.  
STEPHENS, JOSEPH CRAIG, and YOLO  
WATER AND POWER COMPANY, a Cor-  
poration,

Defendants.

**Bill to Redeem.**

Now comes the plaintiff above named, and com-  
plains of the above-named defendants, and for cause  
of action alleges:

**I.**

That the plaintiff is a corporation duly organized  
and existing under and by virtue of the laws of the  
State of Arizona.

**II.**

That the defendant Yolo Water and Power Com-  
pany is a corporation duly organized and existing  
under and by virtue of the laws of the State of Cali-  
fornia.

**III. .**

That the defendants J. M. Adamson, L. D. Ste-  
phens, J. L. Stephens, and Joseph Craig are each and  
all residents and citizens of the State of California.

**IV.**

That on the 30th day of November, 1908, Central

2      *Power & Irrigation Co. of Clear Lake*

Counties Land Company, a corporation duly organized and then existing under and by virtue of the laws of the State of California, was the owner and in possession of, and was entitled to the possession of, all those certain lots, pieces or parcels of land situate, lying, and being in the County of Lake, State of California, described as follows, to wit: [1\*]

The southwest quarter of the southwest quarter of section twenty-seven (27), the north half of the northwest quarter, and lot one (1) of section thirty-four (34), the northeast fractional quarter of section thirty-three (33), and one hundred fifty-six and sixty-seven hundredths (156.67) acres of swamp and overflowed land and contained in Swamp Land Survey Number twenty-three (23) of Napa County, situate in said section thirty-three (33), and more particularly described as follows, to wit:

Beginning at the meander post between section thirty-three (33) and section thirty-four (34) distant 35.00 chains south of the corner to sections twenty-eight (28), twenty-seven (27), thirty-three (33), and thirty-four (34), in township thirteen (13) north of range seven (7) west, Mount Diablo Meridian, thence south 8.43 chains to Cache Creek, thence up creek north 79 deg. west 10.50 chains, south 68 deg., west 4.00 chains, north 86 deg., west 6.00 chains, north 83½ deg., west 5.00 chains, south 34 deg., west 6.00 chains, north 84½ deg., west 12 chains, across a slough one (1) chain wide, south 65½ deg., west 8.50 chains, south 34½ deg., west 9.00 chains, north 74 deg., west 12.00 chains, north 12½ deg., east 27.00

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\*Page-number appearing at foot of page of original certified Record.

chains, north 31 deg., east 10.50 chains, south 84 deg., east 6.00 chains, north 82 deg., east 15.00 chains, north 55 deg., east 11.00 chains, north 9 deg., east 6.00 chains, north 4.30 chains, east 4.00 chains to meander post between sections twenty-eight (28) and thirty-three (33), distant 18.00 chains west of the corner of sections twenty-seven (27), twenty-eight (28), thirty-three (33) and thirty-four (34), thence along United States traverse line south  $14\frac{3}{4}$  deg., west 20.00 chains, thence south  $50\frac{1}{2}$  deg., east 10.30 chains, south 59 deg., east 7.60 chains to the point of beginning.

Saving and excepting therefrom a tract of thirteen (13) acres, more or less, conveyed by Jacob Bower to R. S. Floyd by deed dated the 16th day of April, 1874, and which said deed is duly of record in the office of the County Recorder of the said County of Lake, in Vol. 4 of Deeds, at page 572, and to which said record reference is hereby made for a particular description of the lands so saved and excepted herefrom, all of said lands being situate in township thirteen (13) north of range seven (7) west, M. D. M., the said lands being commonly known as the Jacob Bower Lakeside tract.

ALSO all that part of lot three (3) and lot four (4) of section thirty-four (34), township thirteen (13) north, range seven (7) west, M. D. B. & M., lying south of the County Road leading from Lower Lake to East Lake, lying north of the center of Cache Creek.

ALSO all of swamp land surveys numbered fifteen (15) and sixteen (16) of Napa County, containing

4        *Power & Irrigation Co. of Clear Lake*

in all one hundred and twenty-nine (129) acres of land, more or less, and bounded on the north and east by the County Road, on the south by Cache Creek and Clear Lake, and on the west by land of J. Craig, said lands being commonly known as and called the "Adamson Ranch."

V.

That on said 30th day of November, 1908, the said Central Counties Land Company borrowed of and received from the [2] defendant L. D. Stephens the sum of twenty-one hundred (\$2100.00) dollars in cash, and the said defendant L. D. Stephens, on said 30th day of November, 1908, gave instructions to his agents at Sacramento, California, to pay to the Secretary of State of the State of California the sum of nine hundred (\$900.00) dollars, said amount being then due to the said State of California as the annual license tax in the following named corporations, viz.: Central Counties Land Company, California Industrial Company, Central California Power Company, Clear Lake Power and Irrigation Company, Highland Springs and Squaw Rock Toll Road Company, and Lake Boulevard Company. That said money was subsequently paid to the said Secretary of State of the State of California in payment of said annual license taxes of said corporations.

VI.

That, contemporaneously with the aforesaid transaction of November 30, 1908, and as a part and parcel thereof, and solely for the purpose of securing the repayment to the said L. D. Stephens of said amount of twenty-one hundred (\$2100.00) dollars so bor-

rowed and received from him by the said Central Counties Land Company, as aforesaid, and of the said sum of nine hundred (\$900.00) dollars so directed by him to be paid out as aforesaid, the said Central Counties Land Company made, executed and delivered unto the said defendant L. D. Stephens an instrument in writing, in form a deed, but intended as a mortgage, which said instrument was and is in words and figures as follows, to wit:

“THIS INDENTURE OF DEED made this 30th day of November, A. D. 1908, by and between Central Counties Land Company, a corporation, Grantor, and L. D. Stephens, of Yolo County, California, Grantee, WITNESSETH:

The said grantor for and in consideration of the sum of ten (\$10.00) dollars to it in hand paid, and other good and valuable considerations by it received, does hereby grant, bargain, sell, convey, remise, release, and quitclaim unto the said grantee all those certain lots, pieces and parcels [3] of land situate and being in the County of Lake, State of California, bounded and particularly described as follows, to wit:

The southwest quarter of the southwest quarter (SW.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$ ) of section twenty-seven (27), the north half of the northwest quarter (N.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$ ), and lot one of section (34), the northeast fractional quarter of section thirty-three (33), and 156.67 acres of swamp and overflowed land contained in Swamp Land Survey No. 23 of Napa County, situate in said section thirty-three (33), and more particularly described as follows, to wit: BEGIN-

6        *Power & Irrigation Co. of Clear Lake*

NING at the meander post between section thirty-three (33) and thirty-four (34), distant 35.00 chains south of the corner to sections twenty-eight (28), twenty-seven (27), thirty-three (33) and thirty-four (34) in township thirteen (13) north of range seven (7) west, Mount Diablo Meridian, thence south 8.43 chains to Cache Creek, thence up creek north 79 deg., west 10.50 chains, south 68 deg., west 4.00 chains, north 86 deg., west 6.00 chains, north 83½ deg., west 5.00 chains, south 34 deg., west 6.00 chains, north 84½ deg., west 12 chains across a slough 1.00 chains wide, south 65½ deg., west 8.50 chains, south 34½ deg., west 9.00 chains, north 74 deg., west 12.00 chains, north 12½ deg., east 27.00 chains, north 31 deg., east 10.50 chains, south 84 deg., east 6.00 chains, north 82 deg., east 15.00 chains, north 55 deg., east 11.00 chains, north 9.00 deg., east 6.00 chains, north 4.30 chains, east 4.00 chains to meander post between sections twenty-eight (28) and thirty-three (33), distant 18.00 chains west of the corner of sections twenty-seven (27), twenty-eight (28), thirty-three (33) and thirty-four (34); thence along United States traverse line south 14¾ deg., west 20.00 chains, thence south 50½ deg., east 10.30 chains, south 59 —, east 7.60 chains to the point of beginning, saving and excepting therefrom a tract of 13 acres, more or less, heretofore conveyed by Jacob Bower to R. S. Floyd by deed dated the 16th day of April, 1874, and which said deed is duly of record in the office of the County Recorder of the said County of Lake, in Vol. 4 of Deeds, at page 572, and to which said record reference is hereby made for a particular description

of the lands so saved and excepted herefrom, all of said lands being situate in township thirteen (13) north of range seven (7) west, M. D. M., and the lands hereby conveyed containing in the aggregate 362.71 acres and commonly known as the Jacob Bower lakeside tract.

ALSO all that part of lot three (3) and lot four (4) of section thirty-four (34), township thirteen (13) north, range seven (7) west, M. D. B. & M., lying south of the county road leading from Lower Lake to East Lake, lying north of the center of Cache Creek.

ALSO all of Swamp Land Surveys numbered fifteen (15) and sixteen (16) of Napa County, containing in all one hundred and twenty-nine (129) acres of land, more or less, and bounded on the north and east by the County Road, on the south by Cache Creek and Clear Lake, and on the west by land of J. Craig, and lands hereby conveyed being now commonly known as and called the Adamson Ranch.

TOGETHER with all and singular the tenements, hereditaments and improvements thereon or thereto appertaining.

This deed of conveyance is made and executed and delivered in pursuance of a resolution of the Board of Directors of said corporation, grantor, duly passed and authorized at a meeting of said board regularly called and held, authorizing and directing the President and Secretary to make, execute and deliver this conveyance. [4]

IN WITNESS WHEREOF the said corporation, grantor, has caused this conveyance to be executed in

its name, for it and as its act and deed, by its President and Secretary hereunto duly authorized this day and date herein first above written.

CENTRAL COUNTIES LAND COMPANY,

By LED. F. WINCHELL,

President.

By EDWARD O. ALLEN,

[Seal]

Secretary."

VII.

That the resolution of the Board of Directors of said Central Counties Land Company, authorizing and directing the President and Secretary of said corporation to make, execute and deliver the above and foregoing instrument (being the same resolution referred to in the said instrument) was and is in the words and figures following, to wit:

"BE IT RESOLVED by the Board of Directors of Central Counties Land Company, that the President and Secretary of this corporation be, and they are hereby, authorized and directed to make, execute, and deliver unto L. D. Stephens a deed of conveyance, in the usual form, of all that certain real estate lying and being situated in the County of Lake, in the State of California, which is described in a certain deed dated January 24th, 1907, executed by Yolo County Consolidated Water Company, a corporation, and which is recorded at page 353 of Volume 39 of Deeds, in the office of the County Recorder of Lake County, California, to which said deed, and said record thereof reference is here made, and by reference, the same is made a part of this Resolution.

"That said deed be executed for the nominal con-

sideration of ten dollars, and other good and valuable considerations, and that the said President and Secretary be, and they are hereby authorized, to enter into a written contract with the said L. D. Stephens, whereby this corporation shall have the right, at any time, within seven (7) months from and after the 30th day of November, A. D. 1908, to purchase said land from said Stephens at and for the sum or price of three thousand dollars, and an additional sum equal to interest thereon, at the rate of 8½% per annum from said date until paid, and that time be made of the essence of said contract."

### VIII.

That the lands referred to in said resolution as described in the deed dated January 24th, 1907, executed by the Yolo County Consolidated Water Company, a corporation, and recorded at page 353 of Volume 39 of Deeds in the office of the County Recorder of Lake County, California, is the same property [5] described in the written instrument hereinabove set forth, and also described in paragraph IV of this Complaint.

That after the execution of the aforesaid instrument on said 30th day of November, 1908, the said L. D. Stephens, defendant herein, caused the said instrument, which is in form a deed, to be recorded in Volume — of Deeds, at page —, in the office of the County Recorder of Lake County, California.

### IX.

That contemporaneously with the execution and delivery of the foregoing instrument, in form a deed, the said L. D. Stephens duly executed and delivered

to the said Central Counties Land Company, a defeasance in the words and figures following, to wit:

“THIS MEMORANDUM OF AGREEMENT made this 30th day of November, A. D. 1908, by and between L. D. STEPHENS, of Woodland, Yolo County, California, party of the first part, and CENTRAL COUNTIES LAND COMPANY, a corporation, party of the second part,

WITNESSETH:

“The said party of the *first*, *for* and in consideration of the sum of One (\$1.00) Dollar to him in hand paid, and other good and valuable considerations, hereby covenants, promises and agrees that he will by good and sufficient deed grant, bargain, sell and convey all of his right, title and interest, which he now holds, or which he may during the term of this contract hold, of, in and to that certain real estate, which was conveyed by a certain deed, executed by YOLO COUNTY CONSOLIDATED WATER COMPANY, a corporation, to CENTRAL COUNTIES LAND COMPANY, a corporation, dated the 24th day of January, 1907, and which deed is of record in the office of the County Recorder of Lake County, California, at page 353, in Volume 39 of the Record of Deeds, provided and upon the condition that the said party of the second part shall within seven (7) calendar months from and after the date hereof pay to the party of the first part the sum of Three Thousand (3000) Dollars, as the purchase price of said land, together with the sum equal to interest on the said Three Thousand (3000) Dollars from the date of this agreement until the time of

said payment; all in United States Gold Coin.

“Time is expressly made of the essence of this agreement.

“The party of the second part is not bound to purchase said land, but may do so upon the terms and conditions herein contained at its option, and if the party of the second part shall fail to pay the said purchase price within the time herein expressed and *according the* terms hereof, then this contract shall cease and determine and the party of the first part shall be under no obligation or liability to make any such conveyances, but the said land hereinbefore referred to [6] shall be a remain to party of the first part free and exempt from the rights, claims, and demands of the said party of the second part.

“It is distinctly understood that any conveyance made as aforesaid shall be subject to the trust deed heretofore executed by the Yolo County Consolidated Water Company to the Mercantile Trust Company of San Francisco to secure certain bonded indebtedness.

“IN WITNESS WHEREOF the party of the first part has hereunto subscribed his name and the party of the second part has caused these presents to be executed for it and in its name by its President and Secretary hereunto duly authorized by resolution, this 30th day of November, 1908.

L. D. STEPHENS.

CENTRAL COUNTIES LAND COMPANY,

By LED. F. WINCHELL,

President.

By EDWARD O. ALLEN,

[Corporate Seal]

Secretary.

## X.

That at the time of the execution and delivery to defendant L. D. Stephens of the aforesaid instrument, intended as a mortgage, as aforesaid, the said Central Counties Land Company was in possession of the said premises hereinabove described, and, notwithstanding the execution and delivery of the said instrument, said Central Counties Land Company continued in the occupation and possession of the said premises until the forfeiture of its right to do business as a corporation on November 30, 1911, as hereinafter alleged. That from and after such forfeiture, the former directors of said Central Counties Land Company, and this plaintiff as their successor in interest, continued in the occupation and possession thereof by and through said tenant J. M. Adamson as hereinafter alleged.

That on the 30th day of November, 1911, the defendant J. M. Adamson was, and ever since the 15th day of November, 1907, has been, in possession of the above-described "Jacob Bower Lakeside Tract" as the tenant of said Central Counties Land Company under a lease from year to year, and on said 30th day of November, 1911, said defendant Adamson was, and ever since the 1st day of November, 1910, has been also in possession of the above described "Adamson Ranch" as the tenant of said [7] Central Counties Land Company under a lease from year to year. That the said defendant Adamson has at all times since the said 1st day of November, 1911, been in possession of both of the said ranches hereinabove

described, to wit, the Jacob Bower Lakeside Tract and the Adamson Ranch.

That on the 18th day of December, 1911, the said defendant L. D. Stephens made and executed a written instrument, wherein and whereby he purported to convey to the defendants J. L. Stephens and Joseph Craig all of the property first hereinabove described; that said instrument was thereafter recorded in the office of the County Recorder of Lake County, California; that at the time of receiving the said instrument so purporting to convey to them the property first hereinabove described from the said defendant L. D. Stephens, the said defendants J. L. Stephens and Joseph Craig well knew that the said defendant L. D. Stephens was not the owner of said property, and had actual knowledge of the aforesaid transaction between said defendant L. D. Stephens and said Central Counties Land Company, and that the said instrument, in form a deed as aforesaid, was in fact a mortgage, and said defendants J. L. Stephens and Joseph Craig well knew that the defendant J. M. Adamson was, on said date, in possession of the said premises as the tenant of said Central Counties Land Company.

That at the time of the said transaction the said defendant Joseph Craig was one of the directors of the said Central Counties Land Company, and had participated in the meeting of said Board of Directors of said Company whereat the execution of the said instrument to the defendant L. D. Stephens was authorized by the said Board of Directors of the said Central Counties Land Company, and well knew, and

had actual knowledge of the said transaction, and that the said instrument so executed as aforesaid by said Central Counties Land Company [8] to the defendant L. D. Stephens was and is a mortgage, and that the said defendant J. L. Stephens also knew, and had actual knowledge of, the said transaction, and that the said instrument so executed by said Central Counties Land Company to the defendant L. D. Stephens, as aforesaid was and is a mortgage.

### XII.

That the defendant Yolo Water and Power Company, at all times since its incorporation, has had actual knowledge and notice of the said transaction, and of the fact that the said instrument so executed as aforesaid by said Central Counties Land Company to the defendant L. D. Stephens was and is a mortgage.

That thereafter, and notwithstanding the said actual knowledge and notice of said defendant Yolo Water and Power Company, as to the nature of the aforesaid instrument hereinabove set forth, purporting to convey the said property hereinabove described from said Central Counties Land Company to the defendant L. D. Stephens, said defendant Yolo Water and Power Company received from said defendants J. L. Stephens and Joseph Craig, and said defendants J. L. Stephens and Joseph Craig executed and delivered to said defendant Yolo Water and Power Company, an instrument in writing, in form a grant, bargain and sale deed, wherein and whereby said defendants J. L. Stephens and Joseph Craig

purport to convey unto said defendant Yolo Water and Power Company all the real property hereinabove described, so mortgaged as aforesaid by said Central Counties Land Company to the defendant L. D. Stephens. That said instrument was recorded on June 17th, 1912, in Volume 49 of Deeds, at page 69, of the records of Lake County, California.

### XIII.

That the agreed annual rental of the said lands known as the Jacob Bower Lakeside Tract was \$200.00 per annum, and [9] said rental was paid down to the 15th day of November, 1911, that the agreed annual rental of the said lands known as the "Adamson Ranch" was \$125.00 per annum, and that the said agreed rental for said lands was paid down to the first day of November, 1911.

### XIV.

That said Central Counties Land Company failed to pay its license taxes to the State of California, due in the year 1911, and pursuant to proceedings duly taken by said State of California, to that end, the right of said Central Counties Land Company to do business as a corporation became and was forfeited on the 30th day of November, 1911; that thereupon all of the former directors of said corporation became, under and by virtue of the provisions of the laws of the State of California Trustees of the corporation for the benefit of its creditors and stockholders.

### XV.

That the defendant J. M. Adamson has at all times, as aforesaid been and still is in possession of

said property, but that said defendant Adamson has, since said Central Counties Land Company forfeited its charter as aforesaid, refused and neglected to pay the rental of said property to the Central Counties Land Company, or to its Trustees, and without the consent of the said Central Counties Land Company, or of its said Trustees, or of its or their successors, said defendant Adamson has, as plaintiff is informed and believes, and on such information and belief avers, attempted to attorn to the defendant Yolo Water and Power Company, and now claims to be in possession of said property as the tenant of the said defendant Yolo Water and Power Company.

That the said defendant Adamson claims to have paid, since his alleged attornment, some or all of the rentals for the said property, to the defendants, or to some of them. [10]

## XVI.

That on said 30th day of November, 1911, Anson S. Blake, Leigh Sypher, Charles L. Pierce, R. W. Van Norden, and Joseph Craig were the duly elected, qualified and acting directors of the said Central Counties Land Company.

That the defendant Joseph Craig, ever since the date of the forfeiture of the charter of said Central Counties Land Company as aforesaid, has repudiated said trust, and has, in all things, acted in opposition to the interest of the said Central Counties Land Company, and adversely to it and in derogation of the trust which, as aforesaid, devolved upon him as a member of the Board of Directors of said defunct corporation.

**XVII.**

That by mesne conveyances from said Board of Trustees, all of the title to said real property hereinabove described has become and is now vested in the plaintiff, and plaintiff is the lawful owner thereof as successor in interest of the said Central Counties Land Company.

**XVIII.**

That the defendants herein have not, nor has any or either of them, accounted to plaintiff for the rentals received from said property, or for the value of the use and occupation thereof for the period from and since the said 30th day of November, 1911.

That an accounting as to the rents, issues and profits of the said property will be necessary to ascertain what amount, if any, of moneys is now due and owing to the defendants for and on account of the aforesaid loan, for the purpose of securing which the said mortgage was executed by the said Central Counties Land Company.

**XIX.**

That plaintiff has no knowledge or information as to whether or not the defendants, or whether or not any or either [11] of them is still the owner and holder of the aforesaid indebtedness which the said mortgage was executed to secure, and that a discovery will be necessary to ascertain the identity of the person or corporation to whom or to which payment should be in order to redeem the said property.

**XX.**

That the appointment of a Receiver to take charge of the said property and to collect the rentals there-

for pending this litigation is necessary in order to preserve the said property from waste and injury.

### XXI.

That plaintiff is ready, able and willing to pay such sum as may be found, upon an accounting to be justly due and owing, for principal and interest, to the present owner or owners of the indebtedness which the aforesaid mortgage so executed by the Central Counties Land Company to the defendant L. D. Stephens was given to secure, and plaintiff hereby tenders payment of such amount as may be found to be justly due. [12]

### XXII.

That plaintiff has no plain, speedy, and adequate remedy in the ordinary course of law.

WHEREFORE, plaintiff prays that the aforesaid instrument dated the 30th day of November, 1908, and executed by said Central Counties Land Company to the said defendant L. D. Stephens be adjudged to be a mortgage; that the ownership of the said indebtedness, be ascertained and determined; that an account be taken of the rents, issues and profits of the said property, and that leave be granted to this plaintiff to redeem the said property upon paying to the owner and holder or the owners and holders of the said indebtedness the balance of the said indebtedness, if any, that may be found to be due and owing thereon.

That the said instrument, in form a deed, so executed by said Central Counties Land Company to the defendant L. D. Stephens and that the said instrument in form a deed, so executed by said defend-

ant L. D. Stephens to the defendants J. L. Stephens and Joseph Craig, and the said instrument, in form a deed so executed by the defendants J. L. Stephens and Joseph Craig to the defendant Yolo Water and Power Company, and the record of each of said instruments in the Lake County, California, records, be adjudged to be clouds on plaintiff's title, and be removed.

That a Receiver be appointed to take charge of the said property and to preserve the same from damage, waste or injury during this litigation; and for such other, further different or additional relief as may be meet in the premises and conformable to equity.

CHARLES S. WHEELER and

JOHN F. BOWIE,

Attorneys for Plaintiff.

HARDING & MONROE,

Of Counsel. [13]

State of California,

City and County of San Francisco,—ss.

H. S. Elliot, being first duly sworn, deposes and says:

That he is an officer, to wit, the President of Power and Irrigation Company of Clear Lake, plaintiff in the above-entitled action, and makes this affidavit in its behalf.

That he has read the above and foregoing Bill to Redeem, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on information

20      *Power & Irrigation Co. of Clear Lake*  
and belief, and as to those matters that he believes it  
to be true.

H. S. ELLIOT.

Subscribed and sworn to before me this 12th day  
of June, 1913.

[Seal]                            ALICE SPENCER,  
Notary Public in and for the City and County of  
San Francisco, State of California.

[Endorsed]: Filed Jun. 12, 1913. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [14]

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*In the United States District Court for the North-  
ern District of California.*

No. 24.

POWER AND IRRIGATION COMPANY OF  
CLEAR LAKE, a Corporation,

Plaintiff,

vs.

J. M. ADAMSON, L. D. STEPHENS, J. L.  
STEPHENS, JOSEPH CRAIG, and YOLO  
WATER AND POWER COMPANY, a Cor-  
poration,

Defendants.

**Motion to Dismiss Bill of Complaint.**

NOW COME all of the defendants by their soli-  
citors and move the above-named Court to dismiss  
the bill of complaint in the above-entitled action, on  
the following grounds:

I.

That it appears upon the face of said bill of com-

plaint that the above-entitled court has no jurisdiction of the subject-matter of said complaint.

### II.

That it appears upon the face of said bill of complaint that the above-entitled court has no jurisdiction of the parties to said complaint.

### III.

That the facts stated in said bill of complaint are not sufficient to constitute a valid cause of action in equity against said defendants, or either or any of them.

### IV.

That it appears upon the face of said bill of complaint that the cause of action therein attempted to be set up is barred by the laches of plaintiff and its assignors.

WHEREFORE, the defendants pray that the said bill of [15] complaint may be dismissed.

A. E. SHAW,  
BERT SCHLESINGER,  
DENSON, COOLEY & DENSON,  
MASTICK & PARTRIDGE,  
THEODORE A. BELL,

Solicitors and of Counsel for Defendants.

Received a copy of the within this 2d day of January, 1914.

CHARLES S. WHEELER, and  
JOHN F. BOWIE,  
Attorneys for Complainant.

[Endorsed]: Filed Jan. 3, 1914. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [16]

*In the District Court of the United States, in and  
for the Northern District of California, Second  
Division.*

No. 24—IN EQUITY.

POWER AND IRRIGATION COMPANY OF  
CLEAR LAKE, a Corporation,

Plaintiff,

vs.

J. M. ADAMSON et al.,

Defendants.

**Memorandum Decision on Motion to Dismiss.**

CHARLES S. WHEELER and JOHN F.  
BOWIE, Attorneys for Plaintiff.

A. E. SHAW, BERT SCHLESINGER, DEN-  
SON, COOLEY & DENSON, THEO-  
DORE A. BELL and MASTICK & PART-  
RIDGE, Attorneys for Defendants.

The principles applicable here are similar to those applied in Power and Irrigation Company of Clear Lake et al. vs. Capay Ditch Company et al. (No. 14), and the motion to dismiss the bill must be granted.

It is so ordered.

March 10th, 1914.

M. T. DOOLING,  
Judge.

[Endorsed]: Filed Mar. 10, 1914. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [17]

*In the District Court of the United States, in and  
for the Northern District of California, Second  
Division.*

No. 14—IN EQUITY.

POWER AND IRRIGATION COMPANY OF  
CLEAR LAKE, a Corporation,

Plaintiff,

vs.

CAPAY DITCH COMPANY, a Corporation, YOLO  
COUNTY CONSOLIDATED WATER COM-  
PANY, a Corporation, YOLO WATER  
AND POWER COMPANY, a Corporation,  
J. M. ADAMSON, L. D. STEPHENS, and  
JOSEPH CRAIG,

Defendants.

**Opinion and Order Dismissing Bill.**

CHARLES S. WHEELER and JOHN F.  
BOWIE, Attorneys for Plaintiff.

A. E. SHAW, BERT SCHLESINGER, DEN-  
SON, COOLEY & DENSON, THEO-  
DORE A. BELL and MASTICK & PAR-  
TRIDGE, Attorneys for Defendants.

The plaintiff is a corporation organized under the laws of the State of Arizona.

The complaint avers that the Central Counties Land Company, a corporation, organized under the laws of the State of California was on November 18th, 1907, the owner of certain lands in Lake County, and on that day borrowed from defendant Capay Ditch Company three several sums of money, \$5,625.00, \$8,320.75, and \$10,625.00, and executed

and delivered to said Ditch Company its three several promissory notes for the said amounts all payable on or before August 1st, 1908. That contemporaneously, and as a part of the same transaction, and solely for the purpose of securing the payment of said notes, the said Central Counties Land Company executed and delivered to said Ditch Company an instrument in writing, in form a grant, bargain and [18] sale deed, but intended as a mortgage, conveying to said Ditch Company the said lands in Lake County; that on December 18th, 1911, the said Ditch Company conveyed said lands to defendant Yolo County Consolidated Water Company, which company thereafter conveyed the said lands to defendants L. D. Stephens and Joseph Craig, who in turn conveyed the same to defendant Yolo Water and Power Company, and that each and all of the defendants named took said conveyances with full knowledge of the real nature of the original deed from the Central Counties Land Company to the Capay Ditch Company; that plaintiff is the successor in interest of said Central Counties Land Company, and all of the title to said lands has by mesne conveyances become and is now vested in plaintiff, and that all of the demands of said Central Counties Land Company against the defendants have been transferred to plaintiff. This action seeks to have the deed to the Capay Ditch Company adjudged a mortgage, and that leave be granted plaintiff to redeem said lands by paying whatever is found to be due to such of the defendants as may be entitled to it. Possession of the lands is also sought,

as well as an accounting of the rents, issues and profits thereof. It is further asked that a receiver be appointed to take charge of said lands and preserve the same, and that defendant Yolo Water and Power Company be enjoined from doing certain contemplated work thereon. A number of other averments of the complaint are omitted from this statement because they have no bearing upon the question to be determined at this time. This question arises upon a motion to dismiss the bill upon several grounds, the one chiefly insisted upon being that the court is without jurisdiction because the suit is one upon a chose in action and as the Central Counties Land Company, because a citizen of this State, could not maintain the action [19] in this court, neither can plaintiff, its successor, do so, although a citizen of another State. This brings up for consideration the following provisions of Section 24 of the Judicial Code:

“No District Court shall have cognizance of any suit \* \* \* \* to recover upon any promissory note or other chose in action in favor of any assignee, \* \* \* \* unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made.”

It is strongly urged that this is not a suit upon a chose in action but is a suit to quiet title. However the action may be denominated, it seems quite clear to me that what is sought here is the enforcement of the original contract between the Central Counties Land Company and the Capay Ditch Company, and

the rights asserted are based wholly thereon.

The Court is asked to declare the instrument, in form a deed, to be a mortgage, and to do this because the parties agreed that it was such. If it were not for this agreement plaintiff would have no cause of action against defendants. This agreement is a chose in action, and this suit being to recover upon it, falls within the terms of Section 24 above quoted, and cannot be maintained.

The motion to dismiss will, therefore, be granted.

March 10th, 1914.

M. T. DOOLING,  
Judge.

[Endorsed]: Filed Mar. 10, 1914. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [20]

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At a stated term, to wit, the March term, A. D. 1914, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the court-room, in the City and County of San Francisco, on Tuesday, the 10th day of March, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable MAURICE T. DOOLING, District Judge.

EQUITY—24.

POWER & IRRIGATION CO. OF CLEAR LAKE,

vs.

J. M. ADAMSON et al.

**Order Granting Defendants' Motion to Dismiss Bill.**

Defendants' motion to dismiss the bill, heretofore

heard and submitted, being now fully considered and the Court having filed its opinion thereon, it was ordered that said motion be and the same is hereby granted. [21]

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*In the District Court of the United States for the Northern District of California, Second Division.*

No. 24—EQUITY.

POWER AND IRRIGATION COMPANY OF  
CLEAR LAKE, a Corporation,

Plaintiff,

vs.

J. M. ADAMSON, L. D. STEPHENS et al.,

Defendants.

**Decree.**

THIS matter came on to be heard on the 24th day of January, 1914, upon a motion made by the defendants to dismiss plaintiff's bill of complaint upon the ground that the above-entitled court is without jurisdiction to hear and determine the said cause; whereupon the said motion was argued by counsel for the respective parties, and submitted to the Court for its decision, and all and singular, the premises having been duly considered by the Court and it appearing that the said Court is without jurisdiction to hear and determine the said cause,—

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the said bill of complaint and the said cause be and the same are hereby dismissed, and

that said defendants recover their costs herein,  
taxed at the sum of \$3.70.

M. T. DOOLING,  
Judge of said Court.

[Endorsed]: Filed and entered March 24, 1914.  
Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [22]

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*In the District Court of the United States for the  
Northern District of California, Second Division.*

No. 24.

POWER AND IRRIGATION COMPANY OF  
CLEAR LAKE, a Corporation,

Plaintiff,

vs.

J. M. ADAMSON, L. D. STEPHENS, J. L. STEPHENS, JOSEPH CRAIG, and YOLO WATER AND POWER COMPANY, a Corporation,  
Defendants.

**Petition for Order Allowing Appeal and Order  
Allowing Appeal.**

To the Honorable Court Above Entitled:

The above-named plaintiff, Power and Irrigation Company of Clear Lake, a corporation, considering itself aggrieved by the decree made and entered in the above-entitled Court on the 24th day of March, 1914, in the above-entitled cause, hereby appeals therefrom to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, for the reasons and upon the grounds specified in its Assign-

ment of Errors filed herewith, and prays that this appeal may be allowed; and that a transcript of the record, proceedings, and papers upon which said decree was made and entered as aforesaid, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, sitting at San Francisco, California.

And your petitioner further prays that the proper order touching the security to be required of it to perfect its said appeal, be made.

CHARLES S. WHEELER and  
JOHN F. BOWIE,

Solicitors for Plaintiff. [23]

**Order Allowing Appeal [and Fixing Amount of Bond].**

The foregoing Petition for Appeal is hereby granted, and the appeal is allowed, upon the petitioner filing a bond in the sum of Three Hundred Dollars (\$300.00), to be conditioned as required by law.

Dated September 23, 1914.

M. T. DOOLING,  
Judge.

[Endorsed]: Filed Sept, 23d, 1914. Walter B.  
Maling, Clerk. [24]

*In the District Court of the United States for the  
Northern District of California, Second Division.*

No. 24—EQUITY.

POWER AND IRRIGATION COMPANY OF  
CLEAR LAKE, a Corporation,

Plaintiff,

vs.

J. M. ADAMSON, L. D. STEPHENS, J. L. STEPHENS,  
JOSEPH CRAIG, and YOLO  
WATER AND POWER COMPANY, a Corporation,

Defendants.

**Assignment of Errors on Appeal.**

Now comes the plaintiff in the above-entitled action by its attorneys, Charles S. Wheeler and John F. Bowie, and avers that the decree entered in the above-entitled cause on the 24th day of March, 1914, is erroneous and unjust to the plaintiff, and files with its petition for an appeal from the said decree, the following Assignment of Errors, and specifies that the decree is erroneous in each and every of the following particulars, viz.:

1. The said District Court of the United States for the Northern District of California was not without jurisdiction to hear and determine the said cause, and the order, judgment and decree of said Court dismissing said bill for want of jurisdiction is therefore erroneous.

2. The said Court erred in holding that section 24 of the Judicial Code deprived it of jurisdiction in the above-entitled action, for as much as the provisions of said section 24 are not applicable to the case at bar.

3. The said Court erred in holding that plaintiff's cause of action is based upon a chose in action within the meaning [25] of that phrase as used in section 24 of the Judicial Code, forasmuch as plaintiff's cause of action is not based on a chose in action within the meaning of the phrase as used in section 24 of the Judicial Code, but is an action to remove a cloud from a title and to redeem from a mortgage.

4. The Court erred in holding that plaintiff is the assignee of a mere chose in action as regards the lands described in the bill, forasmuch as the title to the lands in question is shown by said bill to be presently vested in the plaintiff.

5. The Court erred in holding that the bill seeks the enforcement of the original contract between the Central Counties Land Company and L. D. Stephens, forasmuch as such is not the gravamen of plaintiff's cause of action.

6. The Court erred in holding that the rights asserted in the action are based wholly upon the original contract between the Central Counties Land Company and L. D. Stephens; whereas, the fact is, that the rights and equities relied on in the bill arise out of the circumstance that by mandate of express law no title passed under the indenture set forth in the bill.

WHEREFORE, the plaintiff prays that the said decree be corrected or reversed, and the District Court directed to deny said Motion to Dismiss, or that such other relief be awarded as the nature of the case demands.

CHARLES S. WHEELER, and  
JOHN F. BOWIE,

Attorneys for Plaintiff.

[Endorsed]: Filed Sept. 23d, 1914. Walter B.  
Maling, Clerk. [26]

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*In the District Court of the United States for the  
Northern District of California, Second Di-  
vision.*

No. 24—EQUITY.

POWER AND IRRIGATION COMPANY OF  
CLEAR LAKE, a Corporation,

Plaintiff,

vs.

J. M. ADAMSON, L. D. STEPHENS, J. L. STE-  
PHENS, JOSEPH CRAIG, and YOLO  
WATER AND POWER COMPANY, a Cor-  
poration,

Defendants.

**Bond on Appeal.**

KNOW ALL MEN BY THESE PRESENTS,  
That we, Power and Irrigation Company of Clear  
Lake, as principal, and PACIFIC COAST CASU-  
ALTY CO., as surety, of the City and County of San  
Francisco, State of California, are held firmly bound  
unto J. M. Adamson, L. D. Stephens, J. L. Stephens,

Joseph Craig, and Yolo Water and Power Company, a corporation, in the sum of Three Hundred (\$300.00) Dollars, lawful money of the United States, to be paid to them and their respective executors, administrators, and successors and assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our successors and assigns, by these presents.

Sealed with our seals and dated this 23d day of September, 1914.

WHEREAS, the above-named Power and Irrigation Company of Clear Lake has obtained an appeal to the Circuit Court of Appeals of the United States to correct or reverse the decree. [27] of the District Court for the Ninth District of California, in the above-entitled cause.

NOW, THEREFORE, the condition of this obligation is such that if the above-named Power and Irrigation Company of Clear Lake shall prosecute its said appeal to effect and answer all costs if it fails to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

POWER AND IRRIGATION COMPANY  
OF CLEAR LAKE.

By H. S. ELLIOTT,  
President.

[Seal Power and Irrigation Co.]

By R. H. BORLAND,  
Secretary.

PACIFIC COAST CASUALTY COMPANY,

By R. W. STEWART,  
Attorney in Fact.

[Seal Pacific Coast Casualty Company.]

34      *Power & Irrigation Co. of Clear Lake*

Approved September 23d, 1914.

M. T. DOOLING,  
Judge.

[Endorsed]: Filed Sept. 23d, 1914. Walter B.  
Maling, Clerk. [28]

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*In the United States District Court for the Northern  
District of California, Second Division.*

EQUITY—No. 24.

POWER AND IRRIGATION COMPANY OF  
CLEAR LAKE, a Corporation,

Plaintiff,

vs.

J. M. ADAMSON, L. D. STEPHENS, J. L. STEPHENS, JOSEPH CRAIG, and YOLO WATER AND POWER COMPANY, a Corporation,

Defendants.

**Praecipe for Transcript on Appeal.**

To the Clerk of Said Court:

Sir: Please make up, print, and issue in the above-entitled cause a certified transcript of the record, upon an appeal allowed in this cause, to the Circuit Court of Appeals of the United States for the Ninth Circuit, sitting at San Francisco, California, the said transcript to include the following:

Bill to Redeem;

Motion to Dismiss Bill of Complaint;

Notice of Hearing Motion to Dismiss Bill of Complaint;

Memorandum Decision;  
Opinion of Court (Dooling, J.); in action No. 14,  
Equity;  
Minute Order of Tuesday, March 10, 1914;  
Decree Dismissing Bill;  
Petition for Allowance of Appeal, and Order En-  
dorsed Thereon;  
Assignment of Errors on Appeal;  
Citation on Appeal;  
Bond on Appeal;  
Praeclipe for Transcript.

You will please transmit to the Circuit Court of Appeals, [29] with the record to be prepared as above, the Original Citation on Appeal.

CHARLES S. WHEELER and  
JOHN F. BOWIE,

Solicitors for Appellant.

Service and receipt of a copy of the within Prae-  
cipe this 23d day of September, 1914, is hereby ad-  
mitted.

MASTICK & PARTRIDGE,  
A. E. SHAW,  
BERT SCHLESINGER,  
DENSON, COOLEY & DENSON,  
Attorneys for Defendants.

[Endorsed]: Filed Sep. 23, 1914. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [30]

*In the District Court of the United States, in and  
for the Northern District of California.*

No. 24—EQUITY.

POWER AND IRRIGATION COMPANY OF  
CLEAR LAKE, a Corporation,

Plaintiff,

vs.

J. M. ADAMSON, L. D. STEPHENS, J. L. STEPHENS,  
JOSEPH CRAIG, and YOLO  
WATER AND POWER COMPANY, a Corporation,

Defendants.

**Clerk's Certificate to Record on Appeal.**

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing thirty (30) pages, numbered from 1 to 30 inclusive, to be full, true and correct copies of the records and proceedings as enumerated in the praecipe for transcript of record, as the same remain on file and of record in the above-entitled cause, and that the same constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is \$20.00; that said amount was paid by Charles S. Wheeler and John F. Bowie, Esqs., attorneys for plaintiff; and that the original Citation issued in said cause is hereto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 21st day of October, A. D. 1914.

[Seal]

WALTER B. MALING,

Clerk.

By J. A. Schaertzer,  
Deputy Clerk. [31]

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*In the United States Circuit Court of Appeals for  
the Ninth Judicial Circuit.*

POWER AND IRRIGATION COMPANY OF  
CLEAR LAKE, a Corporation,

Plaintiff and Appellant,

vs.

J. M. ADAMSON, L. D. STEPHENS, J. L. STEPHENS, JOSEPH CRAIG, and YOLO WATER AND POWER COMPANY, a Corporation,

Defendants and Appellees.

**Citation on Appeal [Original].**

United States of America,—ss.

The President of the United States, to J. M. Adamson, L. D. Stephens, J. L. Stephens, Joseph Craig, and Yolo Water and Power Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, on the 22 day of October, 1914, being within thirty days from the date hereof, pursuant to an order allowing an appeal,

of record in the clerk's office of the District Court of the United States for the Northern District of California, in the suit numbered 24, in the records of said court, wherein Power and Irrigation Company of Clear Lake, a corporation, is plaintiff and appellant, and you and each of you are defendants and appellees, to show cause, if any there be, why the decree rendered against the said plaintiff and appellant, as in said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable M. T. DOOLING, United States [32] District Judge for the Northern District of California, this 23 day of September, 1914.

M. T. DOOLING. [33]

Service and receipt of a copy of the within Citation, this 23d day of September, 1914, is hereby admitted.

MASTICK & PARTRIDGE,  
A. E. SHAW,  
BERT SCHLESINGER,  
DENSON, COOLEY & DENSON,  
Attorneys for Defendants.

[Endorsed]: No. 24. In the United States Circuit Court of Appeals for the Ninth Circuit. Power and Irrigation Company of Clear Lake, a Corporation, Plaintiff and Appellant, vs. J. M. Adamson et al., Defendants and Appellees. Citation on Appeal. Filed Sep. 23, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 2502. United States Circuit Court of Appeals for the Ninth Circuit. Power and Irrigation Company of Clear Lake, a Corporation, Appellant, vs. J. M. Adamson, L. D. Stephens, J. L. Stephens, Joseph Craig and Yolo Water and Power Company, a Corporation, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Second Division.

Filed October 21, 1914.

FRANK D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.



No. 2502.

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IN THE

**United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT.**

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**POWER AND IRRIGATION COMPANY OF CLEAR  
LAKE, a Corporation,**

**Appellant,**

**vs.**

**J. M. ADAMSON, L. D. STEPHENS, J. L. STEPHENS,  
JOSEPH CRAIG and YOLO WATER AND POWER  
COMPANY, a Corporation,**

**Appellees.**

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**BRIEF OF APPELLANT.**

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CHARLES S. WHEELER and  
JOHN F. BOWIE,

Attorneys for Appellant.

HARDING & MONROE,  
Of Counsel.

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Filed this \_\_\_\_\_ day of March, 1915.

F. D. MONCKTON, Clerk,

By \_\_\_\_\_, Deputy Clerk.

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THE JAMES H. BARRY CO

**Filed**

MAR 2 - 1915

F. D. Monckton.



IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

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POWER AND IRRIGATION COMPANY OF CLEAR LAKE, a Corporation,

*Appellant,*

vs.

J. M. ADAMSON, L. D. STEPHENS,  
J. L. STEPHENS, JOSEPH CRAIG  
and YOLO WATER AND POWER  
COMPANY, a Corporation,

*Appellees.*

{ No. 2502.

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BRIEF OF APPELLANT.

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STATEMENT OF FACTS.

This is an appeal from a decree dismissing appellant's bill for want of jurisdiction.

Appellant is a citizen of Arizona. The appellees are all citizens of California. The court below was of

opinion that the suit was brought to recover upon a *chose in action*, and that as appellant's assignor was a citizen of California, the Court was without jurisdiction under Section 24 of the Judicial Code (Tr., pp. 22-23).

The facts are as follows:

On the 30th day of November, 1908, Central Counties Land Company was the owner and in possession of certain lands (Tr., pp. 2-3).

On that day it borrowed two sums aggregating \$3,000 from appellee L. D. Stephens (Tr., p. 4).

Contemporaneously and as part of the same transaction, and solely for the purpose of securing the repayment of these sums, said Central Counties Land Company executed and delivered to said Stephens a written instrument in form a deed of said properties (Tr., pp. 4-5).

It is alleged that said Stephens executed a defeasance to said Central Counties Land Company dated the same day. In this document Stephens undertakes to reconvey the property to the mortgagor within seven months, upon condition that the mortgagor pay the sum of \$3,000 "together with a sum equal to interest on the said \$3,000 from the date of this agreement until the time of said payment." In other words, the amount to be paid was the identical sum loaned, with interest (Tr., p. 10).

The grantor notwithstanding the execution of the

deed in form, continued to occupy and possess the property (Tr., p. 12).

Stephens on December 18, 1911, executed a purported deed of the lands to appellees J. L. Stephens and Joseph Craig (Tr., p. 13).

Said Stephens and Craig thereafter executed a purported deed to appellee Yolo Water and Power Company (Tr., p. 14).

All of the said grantees took with actual knowledge that the deed absolute in form from the Central Counties Land Company to L. D. Stephens "was and is a mortgage" (Tr., pp. 13-14).

Appellee Adamson, who was the tenant of the mortgagor from November 1st, 1910, on, has been in possession of said lands at all times. He has never surrendered up the possession to his lessor, but while so continuing on in possession has ever since November 30, 1911, attempted to attorn to appellee Yolo Water and Power Company, and claims now to be in possession for the latter company (Tr., pp. 12-15-16).

Appellant is the lawful owner of the lands as successor in interest of said Central Counties Land Co. (Tr., p. 17).

The prayer asks that the deed from the Central Counties Land Company to appellee L. D. Stephens be adjudged to be a mortgage; also for a discovery to ascertain the ownership of the mortgage debt; also for an accounting of the rents and profits, and for the removal of the several clouds upon appellant's title

created by said several purported transfers of the title (Tr., p. 18).

In a memorandum decision the learned judge of the court below declared that the principles applicable to this case are the same as the Court had applied in the case of *Power and Irrigation Co. of Clear Lake v. Capay Ditch Company* (No. 14 below; No. 2500 here on appeal), and that for the reasons given in that case, the bill here must be dismissed for want of jurisdiction (Tr., p. 22).

**THE BRIEF FILED BY APPELLANT IN APPEAL NO. 2500 COVERS ALL OF THE QUESTIONS OF LAW INVOLVED ON THIS APPEAL.**

As the questions involved are fully discussed in our brief in No. 2500—which is here on appeal and is to be heard by the Court along with this appeal,—we respectfully refer the Court to said brief for a full discussion of the law applicable here. The following synopsis will serve to point to the propositions which establish the jurisdiction of the District Court in this cause, and make it clear that the conclusions of the learned judge below are erroneous.

The point is, that the suit is not brought by an assignee to recover upon a chose in action, but by the grantee of real property to remove a cloud from his title. The steps by which this conclusion is reached are as follows:

**First: The deed having been given merely as security was a mortgage, no matter what its terms.**

"If the deed was intended merely as a security for the payment of a debt, it is a mortgage, 'no matter how strong the *language of the deed or any instrument accompanying it might be.*' (*Woods v. Jansen*, 130 Cal., 200.)"

*Todd v. Todd*, 164 Cal., 255, 257.

"But conceding that the contract bears no visible earmarks of a mortgage, still, if the fact be, as the complaint alleges and the demurrer admits, that it was entered into for the purpose of securing to defendant the payment of the balance then due to it, *no form of words, however adroitly used to conceal this purpose*, can estop plaintiff from pleading and proving the fact. As was said in *Russell v. Southard*, 12 How., 139: 'To insist on what was really a mortgage, as a sale, is in equity a fraud which cannot be successfully practiced under the shelter of any written papers, however precise and complete they may appear to be.' It is settled beyond controversy that though a deed be absolute in form, yet if in fact it be intended by the parties to it *as security for the payment of money* or the performance of any lawful act, *it is a mortgage*; and we know of no principle of estoppel which can be invoked to prevent the fact from being disclosed. It is the real character, not the form, of the instrument to which the Court will look."

*Peninsula, etc., Co. v. Pacific S. W. Co.*, 123 Cal., 689, 694.

**Second: The defeasance or contract, no matter what its terms, does not change the character of the deed.**

The point is, that the allegation of the bill that the deed was given solely as security for the money loaned is conclusive on demurrer as to the legal effect of the instrument. That allegation stamps the deed as a mortgage both in fact and in law, and we need not

concern ourselves with the language employed in either the deed or the defeasance.

The following quotation illustrates this:

"The complaint distinctly alleges that the agreement of March 15, 1893, was intended as security for the debt then due; and whether that was its real purpose, or whether the object was to establish different relations between the parties, such as vendor and purchaser, is a question of fact which plaintiff under the allegations of the complaint, is entitled to have tried as an issue of fact upon answer."

*Peninsula, etc. Co. v. Pacific S. W. Co., supra.*

Third: Being, therefore, a mortgage, it must be noted that in California no title passes by it.

See Civil Code of California, Section 2888, and cases cited in brief in Appeal No. 2500, submitted herewith.

Fourth: The cause of action here sued on accrued prior to January 1, 1912, and the jurisdiction is to be determined by the Judiciary Acts of 1887-8, and not by Sec. 24 of the present code.

*McKernan v. North River Ins. Co., 206 Fed., 984;*

*Wells v. Russellville, etc. Co., 206 Fed., 528;*

*Dallyn v. Brady, 197 Fed., 494;*

*M. K. & T. Ry. Co. v. Chappell, 206 Fed., 697;*

*Cady v. Barnes, 208 Fed., 361.*

This point is of importance only in the event that the phrase "chose in action" in the Judicial Code is

given an enlarged meaning so as to include actions by grantees to remove clouds from title—the latter not being included in the acts of 1887-8. But we maintain that the meaning of the earlier statute has not been changed by the Judicial Code.

Fifth: The Acts of 1887-8 which prohibit the Federal Court from taking jurisdiction of suits by assignees to recover on any promissory note or other chose in action, has no reference to a suit by the grantee of lands to remove a cloud from his title.

It was said in *Sheldon v. Sill*, 8 How., 449, 450:

"The only remaining inquiry is, whether the complainant in this case is the assignee of a 'chose in action' within the meaning of the statute. The term 'chose in action' is one of comprehensive import . . . *It is true, a deed of title for land does not come within this description.*"

The Court in *Dundas v. Bowler*, 8 Fed. Cas., 28, 29, said:

"A conveyance of land is not a chose in action . . . That the statute acts upon negotiable paper is clear . . . *That it does not act on conveyances of real estate, either equitably or legally, would seem to be undoubted.*"

"The conveyance by the marshal under the receivership proceedings and the order of the Court was a conveyance of the entire interest in the plant and franchise—as well that of the defendant the Portage City Waterworks Company as that of the bondholders—and can hardly be considered merely as an assignment of the original contract under which the plant was erected. *It was a conveyance of*

*real estate. . . . There does not seem to be any likeness in the case to that of the assignee of a promissory note or other chose in action."*

*Portage City Water Co. v. City of Portage*, 102 Fed., 769, 774.

See also *Gest v. Packwood*, 39 Fed., 525.

We therefore have in this case neither a chose in action nor an assignee of a chose in action. Our suit is not by an assignee at all—let alone “by an assignee to recover upon the contents of a chose in action” for as shown under the next sub-head the bill is to remove a cloud from an owner’s title.

**Sixth:** This bill to redeem is in reality a bill to remove a cloud from title. Such a bill is not a suit to recover upon a chose in action.

The Code of Civil Procedure of California, Section 346, denominates such a suit an “action to redeem a mortgage.”

But the courts of California have pointed out that the lien of the mortgage—whether such mortgage be in the usual form or in the form of a deed absolute—is *extinguished* by lapse of time, and that although called by the Code an “action to redeem a mortgage,”

such an action is in fact a suit to remove a cloud from title.

See:

*Baynor v. Drew*, 72 Cal., 308;

*Baker v. Fireman's Fund Ins. Co.*, 79 Cal., 42;

*Hall v. Arnott*, 80 Cal., 348.

In the case at bar no promissory note was given for the money borrowed. The contract or defeasance calls for a "repurchase" within seven months. Even if this be taken to indicate when the debt fell due, the statute of limitations had run on the debt when the suit was brought. The lien of the mortgage was therefore extinguished (*Raynor v. Drew*, 72 Cal., 308), and the facts bring the case directly within the foregoing authorities.

#### CONCLUSION.

If the owner of land finds his title encumbered by a mortgage of record which has never been paid off, but the lien of which has been extinguished by the lapse of time, he may have the cloud created by the mortgage removed upon doing equity by paying off the mortgage.

This rule applies whether the mortgage is by deed absolute in form or otherwise.

The right of the landowner in such a case is not a

*chose in action*, and if the requisite citizenship exists, the Federal courts have jurisdiction.

Respectfully submitted.

CHARLES S. WHEELER and  
JOHN F. BOWIE,  
Attorneys for Appellant.

HARDING & MONROE,  
Of Counsel.

No. 2502

IN THE

United States Circuit Court of Appeals  
For the Ninth Circuit

POWER AND IRRIGATION COMPANY OF  
CLEAR LAKE (a corporation),  
Appellant,  
vs.

J. M. ADAMSON, L. D. STEPHENS, J. L.  
STEPHENS, JOSEPH CRAIG and YOLO  
WATER AND POWER COMPANY (a  
corporation),  
Appellees.

BRIEF FOR APPELLEES.

S. C. DENSON,  
JOHN S. PARTRIDGE,  
ALAN C. VAN FLEET,  
*Attorneys for Appellees.*

MAR 10 1915

Filed this ..... day of March, 1915.

FRANK D. MONCKTON, Clerk.

By ..... Deputy Clerk.



No. 2502

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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POWER AND IRRIGATION COMPANY OF  
CLEAR LAKE (a corporation),

*Appellant,*

VS.

J. M. ADAMSON, L. D. STEPHENS, J. L.  
STEPHENS, JOSEPH CRAIG and YOLO  
WATER AND POWER COMPANY (a  
corporation),

*Appellees.*

## BRIEF FOR APPELLEES.

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### Statement of Facts.

In 1908, the Central Counties Land Company, hereinafter referred to as the Land Company, was the owner and in possession of certain land in Lake County, California. The Land Company borrowed \$3000 from the appellee Stephens, and as part of the same transaction, executed and delivered to Stephens a deed of said land, absolute in form, but solely for the purpose of securing the repayment of its loan. Contemporaneously, and as part of the

same transaction, Stephens executed a defeasance to the Land Company. In this contract of defeasance Stephens agreed to reconvey the mortgaged property to the mortgagor upon repayment of the \$3000 with interest.

The bill to redeem contains several other averments which in no wise affect the jurisdictional question. They are adverted to here simply that we may have the entire situation before us, and are as follows: The Land Company remained in possession. Stephens executed a purported deed of the land to appellees J. L. Stephens and Joseph Craig, and they, in turn, purported to convey to the appellee Yolo Water and Power Company. All the said grantees took with knowledge of the original mortgage.

This then was the situation in 1913. The Land Company, a *California corporation*, had mortgaged its land to Stephens, a *citizen and resident of California*, to secure the repayment of a loan of \$3000. On April 9, 1913, the Power & Irrigation Company of Clear Lake, appellant herein, was organized as an *Arizona corporation*. The Land Company assigned its *equity of redemption, or its rights under the contract of defeasance with Stephens*, to appellant. On June 12, 1913, appellant, plaintiff below, filed this bill to redeem. The prayer asks that the deed from the Land Company to Stephens be adjudged a mortgage, for an accounting, and for the removal of several clouds on appellant's title.

### Argument on the Law.

It will be noticed that the facts in the case at bar are almost identical with those in the companion case of "*Power and Irrigation Company of Clear Lake v. Capay Ditch Company et al.*," No. 2500, with the exception that the mortgage is accompanied by a distinct contract of defeasance on the part of the mortgagee. As the questions involved here are fully discussed in our brief in No. 2500—which is here on appeal and is to be heard by the Court along with this appeal—, we respectfully refer the Court to said brief for a full discussion of the law applicable here.

Appellant, in its reply brief in this case, has likewise referred the Court to its brief in No. 2500, and in addition has appended a skeleton synopsis of its points to establish the jurisdiction of the District Court in this case. We therefore propose to take up and consider these points *seriatim*.

Appellant states his position thus: this suit is not brought by an assignee to recover upon a chose in action, but by the grantee of real property to remove a cloud from his title. The steps whereby appellant reaches this conclusion are as follows:

1. "The deed having been given merely as security was a mortgage, no matter what its terms."

We will concede this point. The Land Company and Stephens entered into a contract of mortgage. The Land Company *conveyed* its land by *deed abso-*

lute to Stephens, intending the deed merely as security for the payment of the debt. This constitutes a mortgage under the system prevailing in California.

We might here observe that the very reasoning the California Courts employ to unmask the real relations of grantor and grantee where they go through the forms of conveyance simply to secure the payment of a debt, is applicable to the situation in the case at bar. Appellant stoutly maintains that the relation between the Land Company and itself is that of grantor and grantee, that the rights which appellant obtains through "mesne conveyance" from the Land Company are *independent of contract*; but this Court, as do the California Courts, will look behind the averments of appellant's bill and disclose to light the fact that appellant is in reality but the assignee of a pre-existing chose in action, and in attempting to maintain this action is but seeking to accomplish the very mischief which Section 24 of the Judicial Code was enacted to prevent.

2. "The defeasance or contract, no matter what its terms, does not change the character of the deed."

We will concede this point. The contract of defeasance is but an express declaration of the true status of the Land Company and Stephens, showing them in their true light as parties to a contract of mortgage.

3. "Being, therefore, a mortgage, it must be noted that in California, no title passed by it."

This point also we will concede.

4. "The cause of action here sued on accrued prior to January 1, 1912, and the jurisdiction is to be determined by the Judiciary Acts of 1887-8 and not by Section 24 of the present code."

This proposition we must deny. It becomes important to determine whether the question of jurisdiction is controlled by the Judiciary Acts of 1887-8 or by the Judicial Code of 1912, because it is evident that Congress in changing the clause "to recover the *contents* of a chose in action" to the clause "to recover *upon* a chose in action" performed no idle act, but intended that Section 24 of the Judicial Code should be amenable to a more liberal and comprehensive interpretation than that accorded previous acts.

The appellant contends that as the cause of action accrued prior to January 1, 1912, the Judicial Code of 1912 cannot govern the right of appellant to maintain this action, though appellant's right *did not accrue to it by assignment until 1913*. The cases relied on by appellant do not support this contention.

*McKernan v. North River Sus. Co.*, 206 Fed. 984, was an action involving but \$2500, pending at the time of the passage of the Judicial Act of 1912 fixing the jurisdictional amount at \$3000. The juris-

dictional amount prior thereto was fixed at \$2000. The Court very properly decided that it did not lose jurisdiction.

This case has no application here. In the case at bar, the only parties to the action *prior to 1912* were the Land Company and the Ditch Company. Obviously, the Federal Courts had no jurisdiction because the necessary diversity of citizenship was lacking. After the Judicial Code of 1912 went into effect, the Land Company assigned its right of action to the appellant, an Arizona corporation, for the purpose of conferring jurisdiction on the Federal Courts. It is too clear for argument that the Judicial Code of 1912 governs; and denies appellant the right "to recover upon (this) chose in action" when its assignor could not sue thereon.

The other cases referred to on page 6 of appellant's brief are of like effect and may be similarly disposed of.

5. "The Acts of 1887-8 which prohibit the Federal Court from taking jurisdiction of suits by assignees to recover on any promissory note or other chose in action, have no reference to a suit by the grantee of lands to remove a cloud from his title."

To this point we reply that no Federal cases can be found as authority therefor and the fact that the California cases decide that a mortgagor, after the debt is outlawed and the lien extinguished, must proceed to quiet title and can no longer redeem from a mortgage, cannot affect the jurisdictional ques-

tion here involved. However, the action may be denominated it is none the less an action to enforce specific performance of a contract and it is clear by abundant authority that Section 24 of the Judicial Code applies to such actions.

*Corbin v. Black Hawk Co.*, 105 U. S. 659; 26 L. ed. 1136;

*Shoecraft v. Bloxham*, 124 U. S. 730; 31 L. ed. 574;

*Plant Investment Co. v. Jacksonville, etc. Ry. Co.*, 125 U. S. 71.

6. "This bill to redeem is in reality a bill to remove a cloud from title. Such a bill is not a suit to recover upon a chose in action."

This point is substantially the same as point (5) and the answer in reply thereto applies here.

In conclusion, we submit that appellant, in this bill to redeem, is suing "to recover upon a chose in action" within the meaning of Section 24 of the Judicial Code, and as appellant's assignor could not maintain such action, appellant is likewise precluded.

We ask that the order of the District Court dismissing the bill for want of jurisdiction be affirmed.

Dated, San Francisco,

March 10, 1915.

S. C. DENSON,

JOHN S. PARTRIDGE,

ALAN C. VAN FLEET,

*Attorneys for Appellees.*



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

HARRISON H. KEENE,  
Plaintiff in Error,  
vs.

THE UNITED STATES OF AMERICA,  
Defendant in Error.

---

Transcript of Record.

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Upon Writ of Error to the United States District Court of the  
Northern District of California, First Division.

Filed

FEB 23 1915

F. D. Monckton,  
Clerk.



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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HARRISON H. KEENE,  
Plaintiff in Error,  
vs.  
THE UNITED STATES OF AMERICA,  
Defendant in Error.

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Transcript of Record.

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Upon Writ of Error to the United States District Court of the  
Northern District of California, First Division.

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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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UNITED STATES OF AMERICA.

*District Court of the United States, Northern District of California.*

CLERK'S OFFICE.

No. 5421.

UNITED STATES

vs.

HARRISON H. KEENE.

**Praecipe [for Transcript of Record].**

To the Clerk of Said Court:

Sir: Please prepare a certified copy of  
Judgment-roll.

Motion in Arrest of Judgment.

Petition for Writ of Error.

Order Allowing Writ of Error.

Citation Writ of Error.

Bond for Costs Writ of Error.

Original Writ of Error.

Assignment of Errors.

Praecipe for Copies.

MARSHALL B. WOODWORTH,  
Attorney for Defendant.

[Endorsed]: Filed Oct. 9, 1914. W. B. Maling,  
Clerk. By T. L. Baldwin, Deputy Clerk. [1\*]

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\*Page-number appearing at foot of page of original certified Record.

**Indictment.**

*In the District Court of the United States, in and for  
the Northern District of California, First  
Division.*

Violation Act June 25, 1910, White Slave Traffic Act.

At a stated term of said Court begun and holden at the City and County of San Francisco, within and for the Northern District of California, on the first Monday of November in the year of our Lord one thousand nine hundred and thirteen,

The Grand Jurors of the United States of America, within and for the State and District aforesaid, on their oaths present: THAT

**HARRISON H. KEENE**

hereinafter called the defendant, heretofore, to wit, on the third day of May in the year of our Lord one thousand nine hundred and thirteen, did unlawfully, wilfully, knowingly and feloniously procure and obtain, and cause to be procured and obtained, and aid and assist in procuring and obtaining transportation on a steamship known as and named the "Alliance," a steamship owned by the North Pacific Steamship Company, a corporation, on board the said steamship "Alliance" so belonging to the said steamship company, at the City of Eureka, County of Humboldt, State and Northern District of California, for passage between the said City of Eureka, County of Humboldt, State and Northern District of California, and the City of Portland in the State of Oregon; that the said steamship "Alliance" is operated

between the said points, to wit, the City of Eureka, California, and the City of Portland, Oregon, aforesaid, and the said transportation was procured and obtained to be used by a certain woman, to wit, one Myrtle Kellett, in traveling on said line between the said State of California and the State of [2] Oregon in interstate commerce, whereby said woman was then and there transported in interstate commerce, to wit, from Eureka, California, to Portland, Oregon, on board the said steamship "Alliance" so owned and operated by the North Pacific Steamship Company, with the intent and purpose on the part of the said defendant that said woman should engage in the practice of debauchery and for other immoral purposes, to wit, that she should live and cohabit with him, the said defendant, in Portland, Oregon, as his concubine.

That said North Pacific Steamship Company was and is, as defendant then and there well knew, a common carrier engaged in the business of transporting and carrying passengers in interstate commerce, to wit, from the State of California to the State of Oregon and that said steamship "Alliance" belonging to said company did then and there act in such capacity, to wit, in the capacity of carrying passengers in interstate commerce in taking said woman from the State of California to the State of Oregon.

AGAINST the peace and dignity of the United States of America and contrary to the form of the statute of said United States of America in such case made and provided.

**SECOND COUNT.**

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: THAT

**HARRISON H. KEENE**

hereinafter called the defendant, heretofore, to wit, on the third day of May in the year of our Lord one thousand nine hundred and thirteen, at Eureka, in the County of Humboldt, in the State and Northern District of California, then and there being, did then and there willfully, unlawfully and feloniously, knowingly persuade, induce and entice, and cause to be persuaded, induced and enticed, [3] and aid and assist in persuading, inducing and enticing, a certain girl, to wit, one Myrtle Kellett, to go from said City of Eureka, in the State and Northern District of California, to Portland, in the State of Oregon, in interstate commerce, by water over the line of the North Pacific Steamship Company, to wit, on board the steamship "Alliance," for the purpose of debauchery and for an immoral purpose, to wit, that she, the said Myrtle Kellett, should be and become the concubine and mistress of the said defendant;

That the North Pacific Steamship Company is and was, as defendant then and there well knew, a common carrier engaged in the business of transporting and carrying passengers in interstate commerce, to wit, from the State of California to the State of Oregon, and the steamer "Alliance" so owned and operated by the North Pacific Steamship Company did act in such capacity in bringing said woman, Myrtle Kellett, from the State of California to the State of Oregon.

AGAINST the peace and dignity of the United States of America and contrary to the form of the statute of said United States of America in such case made and provided.

BENJ. L. MCKINLEY,  
United States Attorney.

Names of witnesses appearing before Grand Jury:  
Lee Kellett, Chas. W. Backstedt, F. G. Strauss.

[Endorsed]: A True Bill. J. G. Martin, Foreman Grand Jury. Presented in Open Court and Filed Dec. 30, 1913. W. B. Maling, Clerk. By Francis Krull, Deputy Clerk. [4]

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At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 19th day of January in the year of our Lord, one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

No. 5421.

UNITED STATES

vs.

HARRISON H. KEENE.

**Plea.**

The defendant herein being present in open court, said defendant then and there pleaded not guilty to the indictment herein against him, which said plea was by the Court ordered and is hereby entered. [5]

**[Minutes of Trial—March 16, 1914.]**

At a stated term of the District Court of the United States of America, for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 16th day of March in the year of our Lord, one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

No. 5421.

UNITED STATES

vs.

HARRISON H. KEENE.

The defendant herein being present in open court with his attorney, Frank McGowan, Esqr., and Thos. H. Selvage, Asst. U. S. Atty., appearing for the Government by the Court ordered that the trial of this case do now proceed. By the Court ordered that an attachment issue for Myrtle Cunningham, a defaulting witness herein. The following named jurors were duly drawn, sworn, examined, accepted and impanelled to try this case, viz.: K. H. Plate, Dan R. McNeil, Edward McGattigan, Leroy W. Jackson, D. H. Lohsen, Dixwell Hewitt, Wm. S. Hanbridge, C. M. Volkman, Thomas Dillon, P. A. Dinsmore, George L. Center and D. C. Dorsey.

Alfred P. Hampton a juror drawn was by the Court excused for cause. The following named jurors drawn were upon peremptory challenge by the Government excused, viz.: Irving H. Kahn, Richard J. Welch and C. R. Johnson, Mr. Selvage stated the

case and called H. L. Gorham, Mrs. V. E. Pruitt, F. G. Strauss, E. V. Farmer, Grace Kellett, Lee Kellett, Joseph R. H. Jacoby, Geo. B. Davenpeck, Arthur C. Burton, who were each duly sworn and examined on behalf of the United States, and introduced in evidence certain exhibits which were marked United States exhibits and number 1 to 9 inclusive. The further trial of this case was then continued until to-morrow at 10 o'clock A. M. [6]

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**[Minutes of Trial—March 17, 1914.]**

At a stated term of the District Court of the United States of America, for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 17th day of March in the year of our Lord, one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, Judge.

No. 5421.

UNITED STATES

vs.

HARRISON H. KEENE.

The defendant herein with his counsel, counsel for the Government and the jury sworn to try the case being present in open court. The further trial of this case was resumed. Mr. Selvage recalled Francis Kellett, F. G. Strauss and Lee Kellett for further examination and called Charles W. Backstedt, H. J. Martin, Paul Arnrich, who were each duly sworn and examined on behalf of the Government. The Gov-

ernment here rested its case.

Mr. McGowan called Walter Johnson, James Grant, Harrison H. Keene, who were each duly sworn and examined as witnesses on behalf of defendant. Mr. Preston, U. S. Atty., recalled Lee Kellett, for further examination. The case was then argued by respective counsel and thereupon the Court charged the jury, who at 4:35 o'clock P. M. retired to deliberate upon their verdict, and at 5:20 o'clock P. M. returned into court with the following verdict in writing: "We, the jury, find Harrison H. Keene, the defendant at the bar Guilty on the first count of the indictment, and not guilty on the second count of the indictment. G. L. Center, Foreman." By the Court ordered that said verdict be and the same is [7] hereby recorded, and as so recorded the same was read to the jurors, who were each asked if that was his verdict and each answered that it was. Further ordered that defendant appear for judgment on March 21, 1914. Further ordered that the bail of defendant be fixed in the sum of \$5,000, pending judgment. Further ordered that defendant be remanded to the custody of the U. S. Marshal. [8]

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*In the District Court of the United States, in and  
for the Northern District of California.*

No. 5421.

THE UNITED STATES OF AMERICA

vs.

HARRISON H. KEENE.

**Verdict.**

We, the Jury, find HARRISON H. KEENE, the prisoner at the bar, Guilty on the First count of the Indictment, and NOT GUILTY on the Second count of the Indictment.

G. L. CENTER,  
Foreman.

[Endorsed]: Filed Mch. 17, 1914, at 5 o'clock and 20 minutes P. M. W. B. Maling, Clerk. By Francis Krull, Deputy Clerk. [9]

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**[Order Denying Motion for a New Trial, etc.]**

At a stated term of the District Court of the United States of America, for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Wednesday, the 1st day of April, in the year of our Lord, one thousand nine hundred and fourteen. Present: The Honorable MAURICE T. DOOLING, District Judge.

No. 5421.

UNITED STATES OF AMERICA

vs.

HARRISON H. KEENE.

The defendant, being present in person and with his attorney, F. A. McGowan, Esq., United States Attorney, John W. Preston Esq., moved the Court for judgment upon the verdict of Guilty heretofore

entered herein. The defendant thereupon filed a motion for a new trial and made a motion for arrest of judgment. After hearing counsel for the respective parties, the Court ordered that said motions be, and the same are hereby denied. Thereupon no cause being shown or appearing to the Court why judgment should not be pronounced herein, the Court ordered that said Harrison H. Keene, for the offense of which he stands convicted, be, and he is hereby sentenced to be imprisoned for the term of one (1) year in the County Jail of the County of Alameda, State of California. Further ordered upon motion of Mr. McGowan, that the execution of the judgment heretofore entered be stayed for the period of ten (10) days, and that defendant have thirty (30) days in which to prepare and serve his Proposed Bill of Exceptions: Further ordered that defendant be admitted to bail in the sum of Five Thousand (\$5,000.00) Dollars, pending the determination of said [10] appeal. It appearing to the Court that Mrs. C. B. Cunningham, a defaulting witness in this case, was present in court, and on motion of John W. Preston, said Mrs. Cunningham was called to the bar, and after being sworn was duly examined. It appeared to the Court that she had failed to obey a subpoena of this court, and it is therefore ordered and adjudged that said Mrs. C. B. Cunningham be, and she is hereby adjudged guilty of contempt of this court, and that she be punished by confinement in the County Jail of Alameda County, State of California, for the period of thirty (30) days. [11]

*In the District Court of the United States, for the  
Northern District of California, First Division.*

No. 5421.

THE UNITED STATES OF AMERICA

vs.

HARRISON H. KEENE.

**Judgment on Verdict of Guilty on the First Count  
of the Indictment.**

Convicted of Violation White Slave Traffic Act.

Now, on this 1st day of April, 1914, the defendant, Harrison H. Keene, in his own proper person and with his counsel, Frank McGowan, Esq., being present in open court, come John W. Preston, Esq., United States Attorney, and move the Court that judgment be pronounced in this cause; whereupon the defendant was duly informed by the Court of the nature of the Indictment filed on the 30th day of December, 1913, charging him with the crime of a violation of the White Slave Traffic Act; of his arraignment and plea of Not Guilty; of his trial and the verdict of the jury on the 17th day of March, A. D. 1914, to wit: "We, the Jury, find Harrison H. Keene, the prisoner at the bar, Guilty on the first count of the Indictment, and not guilty on the second count of the Indictment."

The defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, and no sufficient cause being shown or appearing to the Court, and the Court having denied a motion for a new trial, and a motion in

arrest of Judgment, thereupon the Court rendered its judgment:

THAT WHEREAS, the said Harrison H. Keene, having been duly convicted in this court of the crime of a violation of the White Slave Traffic Act:

IT IS THEREFORE ORDERED AND ADJUDGED that the said [12] Harrison H. Keene be imprisoned for the term of one year, in the Alameda County Jail, Alameda County, California.

JUDGMENT ENTERED this 1st day of April, A. D. 1914.

W. B. MALING,  
Clerk.

By C. W. Calbreath,  
Deputy Clerk. [13]

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*In the District Court of the United States, for the Northern District of California.*

No. 5421.

UNITED STATES

vs.

H. H. KEENE.

**Clerk's Certificate to Judgment-roll.**

I, W. B. MALING, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the Judgment-roll in the above-entitled action.

ATTEST my hand and the seal of said District Court, this 1 day of April, 1914.

W. B. MALING,

Clerk.

By C. W. Calbreath,

Deputy Clerk.

[Endorsed]: Filed April 1, 1914. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [14]

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*In the District Court of the United States, in and for  
the Northern District of California, First Division.*

No. 5421.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HARRISON H. KEENE,

Defendant.

**Motion in Arrest of Judgment.**

The defendant in the above-entitled cause, before judgment or sentence, respectfully moves the Court, for error appearing on the face of the indictment and upon the face of the record, that judgment for the Government be arrested and withheld, and the conviction rendered herein declared null and void.

Said motion is based on the following grounds:

1st. That the Indictment herein, that is to say, the First Count, fails to state a public offense under the Act of June 25th, 1910, or any other Act or statute;

2nd. The specific acts set forth in the First Count of the Indictment, to wit, "that she should live and

cohabit with him, the said defendant, in Portland, Oregon, as his concubine," show that the acts charged therein are not a violation of said Act of June 25th, 1910.

WHEREFORE, defendant prays that said judgment be arrested and that no sentence be had therein.

FRANK McGOWAN,  
Attorney for Said Defendant.

[Endorsed]: Filed April 2d, 1914, Nun Pro Tunc as of April 1st, 1914. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [15]

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*In the District Court of the State of California, in  
and for the Northern District of California,  
First Division.*

THE UNITED STATES,  
vs.

HARRISON H. KEENE,  
Defendant.

**Petition for Writ of Error.**

HARRISON H. KEENE, the defendant in the above-entitled cause, feeling himself aggrieved by the judgment of the above-entitled court, entered upon the first day of April, 1914, whereby it was adjudged that the defendant be confined in the County Jail of Alameda County, State of California, for the term of one year, or until he be otherwise discharged, now comes through his attorneys and petitions said court for an order allowing him, the said defendant, to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit under

and according to the laws of the United States in that behalf made and provided; and that all further proceedings in this court be suspended, stayed and superseded until the determination of said writ of error by the United States Circuit Court of Appeals in and for the Ninth Circuit.

And your petitioner will ever pray, etc.

Dated: May 8th, 1914.

FRANK H. McGOWAN,  
MARSHALL B. WOODWORTH,  
Attorneys for Defendant.

Due service and a copy of the within Petition for Writ of Error admitted this 9th day of May, 1914.

JNO. W. PRESTON,  
U. S. Attorney.

[Endorsed]: Filed May 9, 1914. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [16]

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*In the District Court of the United States, in and for  
the Northern District of California, First Division.*

No. 5421.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HARRISON H. KEENE,

Defendant.

**Assignment of Errors.**

Now comes the defendant in the above-entitled cause, by Marshall B. Woodworth, Esq., one of his attorneys, and specifies the following as the errors

upon which he will rely and which he will urge upon his writ of error in the above-entitled cause, to wit:

### I.

The Court erred in not granting the motion in arrest of judgment, to which ruling the defendant then and there excepted.

### II.

The Court erred in not holding that the Indictment herein, that is to say, the First count thereof, failed to state a public offense under the "White-slave traffic Act," or any other act or statute, to which the defendant then and there excepted.

### III.

The Court erred in holding that the specific acts set forth in the First count of the Indictment, to wit: "that she should live and cohabit with him, the said defendant, in Portland, Oregon, as his concubine," showed that the acts charged therein are a violation of said "White-slave traffic Act," to which the defendant then and there excepted. [17]

### IV.

The Court erred in not holding that the allegations contained in said first count of said Indictment were insufficient to sustain the judgment of conviction, and in not arresting the judgment of conviction on said first count, inasmuch as said first count of said Indictment did not set out any facts constituting such an offense or offenses as was intended by Congress to be prosecuted by virtue of the Act known as the "White-slave traffic Act," nor does the prevention and punishment of the acts alleged in said first count of said indictment fall within the scope of the

purpose for which that Act was intended and which the defendant is charged with having violated, in that there were no allegations in said first count of said Indictment to show that the defendant profited by, or expected to, or intended to, profit in, or share in any profit, ensuing or arising, in pursuance of the transportation set out in said first count of said indictment, to which ruling the defendant then and there excepted.

## V.

The Court erred in not holding that the offenses alleged in said first count of said Indictment came solely within the police power of the State of California and of the State of Oregon, and that the District Court of the United States in and for the Northern District of California, First Division, could not assume jurisdiction thereof without violating Article 10 of the Amendments to the Constitution of the United States, to which ruling the defendant then and there duly excepted.

## VI.

The Court erred in holding that it had jurisdiction of the [18] person of the defendant or the subject matter contained in said first count of the Indictment, or of the offense, or any of the offenses, alleged to have been committed by said defendant, to which ruling the defendant duly excepted.

## VII.

The Court erred in not holding that the Act under which said Indictment purports to be framed, the Act of June 25, 1910, known and referred to as the "White-slave traffic Act," is unconstitutional and

not authorized by any provision of the Constitution or the amendments thereto, to which ruling the defendant then and there excepted.

### VIII.

The Court erred in holding that the allegations contained in the first count of said Indictment constituted any violation of the "White-slave traffic Act," to which ruling the defendant then and there excepted.

### IX.

The Court erred in imposing sentence and judgment upon the defendant in the County Jail of Alameda County, State of California, for the term of one year, and that he be fined the sum of \_\_\_\_\_, and that he be imprisoned until the fine is paid or until he is otherwise discharged, to which defendant then and there excepted.

WHEREFORE, for the many manifest errors committed by said Court, the defendant through his attorneys prays that said sentence and judgment of conviction be reversed and for such other and further relief as the Court may think meet and proper.

Dated: September 28, 1914.

MARSHALL B. WOODWORTH,  
FRANK McGOWAN,

Attorneys for Defendant. [19]

Service of within Assignment of Errors admitted this 29th day of September, 1914.

JNO. W. PRESTON,  
U. S. Attorney.

[Endorsed]: Filed Sep. 29, 1914. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [20]

*In the District Court of the United States, in and for  
the Northern District of California, First Divi-  
sion.*

THE UNITED STATES

vs.

HARRISON H. KEENE,

Defendant.

**Order Allowing Writ of Error.**

Upon motion of Frank H. McGowan and Marshall B. Woodworth, attorneys for the defendant, in the above-entitled cause, and upon filing the petition for writ of error herein,

IT IS HEREBY ORDERED that a writ of error be, and it is hereby, allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore rendered herein; and other matters and things in said petition set forth; and that meanwhile all further proceedings in this Court be suspended, stayed and superseded until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: May 8, 1914.

M. T. DOOLING,  
U. S. Judge.

Due service and receipt of a copy of the within order admitted this 9th day of May, 1914.

JNO. W. PRESTON.

[Endorsed]: Filed May 9, 1914. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [21]

**Citation on Writ of Error (Copy).**

UNITED STATES OF AMERICA,—ss.

The President of the United States, to the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's Office of the United States District Court for the Northern District of California (1st Division), wherein HARRISON H. KEENE is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable MAURICE T. DOOLING, United States District Judge for the Northern District of California, 1st Division, this 29 day of September, A. D. 1914.

M. T. DOOLING,  
United States District Judge.

United States of America,—ss.

On this 29 day of September, in the year of our Lord one thousand nine hundred and fourteen, personally appeared before me, Clerk of the United States District Court for the Northern District of California, the subscriber, MARSHALL B. WOODWORTH, and makes oath that he delivered a true

copy of the within citation to Hon. JOHN W. PRESTON, United States Attorney for the Northern District [22] of California, attorney for the defendant in error.

MARSHALL B. WOODWORTH.

Subscribed and sworn to before me at San Francisco, California, this 29 day of September, A. D. 1914.

[Seal] C. W. CALBREATH.

Deputy Clerk U. S. District Court, Northern District of California.

[Endorsed]: Filed Sep. 29, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [23]

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#### Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, That we, HARRISON H. KEENE as principal, and MARTIN ARONSOHN and E. M. HEIN, as sureties, are held and firmly bound unto the United States in the full and just sum of five hundred (\$500) dollars, to be paid to the said United States certain attorney, executors, administrators of assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 28th day of September in the year of our Lord One Thousand Nine Hundred and Fourteen.

WHEREAS, lately at a District Court of the United States, for the Northern District of California, in a suit depending in said court, between United

States of America and Harrison H. Keene a judgment was rendered against the said Harrison H. Keene and the said Harrison H. Keene having obtained from said Court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California.

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That if the said HARRISON H. KEENE shall prosecute his writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

HARRISON H. KEENE. (Seal)

MARTIN ARONSOHN. (Seal)

E. M. HEIN. (Seal)

Acknowledged before me the day and year first above written.

[Seal] CHARLES R. HOLTON,  
Notary Public in and for the City and County of  
San Francisco, State of California. [24]

United States of America,  
Northern District of California,—ss.

MARTIN ARONSOHN and E. M. HEIN, being duly sworn, each for himself, deposes and says: That he is a freeholder in said District, and is worth the sum of Five Hundred (\$500) Dollars, exclusive of property exempt from execution, and over and

above all debts and liabilities.

MARTIN ARONSOHN.

E. M. HEIN.

Subscribed and sworn to before me this 29 day of Sept. A. D. 1914.

[Seal] CHARLES R. HOLTON,  
Notary Public in and for the City and County of San Francisco, State of California.

Bond Approved:

JOHN W. PRESTON,  
U. S. Attorney.

[Endorsed]: Filed Oct. 1, 1914. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [25]

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**Certificate of Clerk U. S. District Court to Transcript  
of Record on Writ of Error.**

I, WALTER B. MALING, Clerk of the District Court of the United States of America for the Northern District of California, do hereby certify that the foregoing 25 pages, numbered from 1 to 25, inclusive, contain a full, true and correct Transcript of certain records and proceedings, in the Case of the United States of America vs. Harrison H. Keene, numbered 5421, as the same now remain on file and of record in the office of the Clerk of said District Court; said Transcript having been prepared pursuant to and in accordance with the "Praecipe," (copy of which is embodied in this Transcript), and the instructions of Marshall B. Woodworth, Esquire, Attorney for Defendant and Plaintiff in Error.

I further certify that the costs for preparing and certifying the foregoing Transcript on Writ of Error is the sum of Twelve Dollars and Twenty Cents (\$12.20), and that the same has been paid to me by the Attorney for the Plaintiff in Error herein.

Annexed hereto is the Original Citation on Writ of Error (pages 30 and 31), and the Original Writ of Error (pages 27 and 28) with the return of the said District Court to said Writ of Error attached thereto (page 29).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 22d day of October, A. D. 1914.

[Seal]

W. B. MALING,  
Clerk.

By C. W. Calbreath,  
Deputy Clerk. [26]

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**Writ of Error (Original).**

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, To the Honorable, the Judges of the District Court of the United States, for the Northern District of California, 1st Division, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between United States of America, defendant in error, a manifest error hath happened, to the great damage of the said Harrison H. Keene, plaintiff in error, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, the 29th day of September, in the year of our Lord One Thousand, Nine Hundred and Fourteen.

W. B. MALING,

Clerk of the United States District Court, Northern District of California.

C. W. Calbreath,

Deputy Clerk U. S. District Court, Northern District of California.

Allowed by

M. T. DOOLING,

U. S. Dist. Judge.

Service admitted this 29th day of September, 1914.

JNO. W. PRESTON,

U. S. Atty.

[Endorsed]: No. 5421. United States District Court, for the Northern District of California, 1st Division. Harrison H. Keene, Plaintiff in Error, vs. United States, Defendant in Error. Original Writ of Error. Filed Sep. 29, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.  
[28]

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**Return to Writ of Error.**

The Answer of the Judges of the District Court of the United States of America, for the Northern District of California, to the within Writ of Error.

As within we are commanded, we certify under the seal of our said District Court, in a certain schedule to this Writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, within mentioned, at the day and place within contained.

We further certify that a copy of this Writ was on the 15th day of October, A. D. 1914, duly lodged in this Court for the within named defendant in Error.

By the Court:

[Seal]                   WALTER B. MALING,  
Clerk United States District Court, Northern Dis-  
trict of California.

By C. W. Calbreath,  
Deputy Clerk. [29]

**Citation on Writ of Error (Original).**

UNITED STATES OF AMERICA,—ss.

The President of the United States, to the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's Office of the United States District Court for the Northern District of California, 1st Division, wherein Harrison H. Keene is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable MAURICE T. DOOLING, United States District Judge for the Northern District of California, 1st Division, this 29 day of September, A. D. 1914.

M. T. DOOLING,  
United States District Judge. [30]

United States of America,—ss.

On this 29th day of September, in the year of our Lord one thousand nine hundred and fourteen, personally appeared before me Clerk of the United States District Court for the Northern District of California, the subscriber, Marshall B. Woodworth, and makes oath that he delivered a true copy of the

within citation to Hon. John W. Preston, United States Attorney for the Northern District of California, attorney for the defendant in error.

MARSHALL B. WOODWORTH.

Subscribed and sworn to before me at San Francisco, California, this 29 day of September, A. D. 1914.

[Seal] C. W. CALBREATH,  
Deputy Clerk U. S. District Court, Northern District of California.

[Endorsed]: No. 5421. U. S. Circuit Court of Appeals, for the Ninth Circuit. Harrison H. Keene, Plaintiff in Error, vs. United States. Citation on Writ of Error. Filed Sep. 29, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [31]

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[Endorsed]: No. 2506. United States Circuit Court of Appeals for the Ninth Circuit. Harrison H. Keene, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Northern District of California, First Division.

Received October 22, 1914.

F. D. MONCKTON,  
Clerk.

Filed October 28, 1914.

FRANK D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals,  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.

No. 2506

IN THE

United States Circuit Court of Appeals  
For the Ninth Circuit

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HARRISON H. KEENE,

*Plaintiff in Error,*

vs.

THE UNITED STATES OF AMERICA,

*Defendant in Error.*

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**BRIEF FOR PLAINTIFF IN ERROR.**

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FRANK McGOWAN,

MARSHALL B. WOODWORTH,

*Attorneys for Plaintiff in Error.*

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Filed this..... day of March, 1915.

FRANK D. MONCKTON, Clerk.

By.....

Deputy Clerk.

**Filed**



No. 2506

IN THE

**United States Circuit Court of Appeals**  
**For the Ninth Circuit**

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HARRISON H. KEENE,

*Plaintiff in Error,*

vs.

THE UNITED STATES OF AMERICA,

*Defendant in Error.*

---

**BRIEF FOR PLAINTIFF IN ERROR.**

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**Statement of the Case.**

The plaintiff in error, Harrison H. Keene, was indicted and convicted in the District Court of the United States, in and for the Northern District of California, for a violation of the act of Congress of June 25, 1910 (36 Stat. 825), designated, in Section 8 of the Act, as the "White-slave traffic Act".

The indictment contained two counts. The plaintiff in error was convicted on the first count and acquitted on the second count of the indictment. He was sentenced to be imprisoned for the term of one year in the Alameda County Jail, Alameda

County, California. He prosecutes this writ of error from the judgment of conviction. A motion in arrest of judgment was interposed, which was ~~decided~~. The assignments of errors raise two questions with reference to the conviction of the plaintiff in error on the first count of the indictment, he having been acquitted on the second count. They are as follows:

First. That the "White-slave traffic Act" is unconstitutional;

Second. That the allegations contained in the first count of the indictment, upon which alone plaintiff in error was convicted, assuming them to be true, do not constitute such an offense as was intended by Congress to be prosecuted by virtue of the Act known as the "White-slave traffic Act".

The first count of the indictment charged that the plaintiff in error, on May 3, 1913,

"did unlawfully, wilfully, knowingly and feloniously procure and obtain, and cause to be procured and obtained, and aid and assist in procuring and obtaining transportation on a steamship known as and named the 'Alliance', a steamship owned by the North Pacific Steamship Company, a corporation, on board the said steamship 'Alliance' so belonging to the said steamship company, at the City of Eureka, County of Humboldt, State and Northern District of California, for passage between the said City of Eureka, County of Humboldt, State and Northern District of California and the City of Portland, in the State of Oregon; that the said steamship 'Alliance' is operated between the said points, to wit: the City of

Eureka, California, and the City of Portland, Oregon, aforesaid, and the said transportation was procured and obtained to be used by a certain woman, to wit, one Myrtle Kellett, in travelling on said line between the said State of California and the said State of Oregon, in interstate commerce, whereby said woman was then and there transported in interstate commerce, to wit, from Eureka, California, to Portland, Oregon, on board the said steamship 'Alliance' so owned and operated by the North Pacific Steamship Company, with the intent and purpose on the part of the said defendant that said woman should engage in the practice of debauchery and for other immoral purposes, to wit, that she should live and cohabit with him, the said defendant, in Portland, Oregon, as his concubine."

The second count charged the plaintiff in error with having persuaded, induced and enticed, and caused to be persuaded, induced and enticed, and aided and assisted in persuading, inducing and enticing one Myrtle Kellett to go from said City of Eureka, in the State and Northern District of California, to Portland, in the State of Oregon, in interstate commerce, by water over the line of the North Pacific Steamship Company, to wit, on board the steamship 'Alliance', for the purpose of debauchery, and for an immoral purpose, to wit, that she, the said Myrtle Kellett, should be and become the concubine and mistress of the said defendant.

As stated, plaintiff in error was acquitted upon the charge that he had persuaded or induced or

enticed Myrtle Kellett to go from Eureka, California, to Portland, Oregon, for the purpose alleged in the second count of the indictment.

The argument, made on behalf of plaintiff in error, is, therefore, limited to a consideration of the allegations of the first count of the indictment.

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## I.

### Argument.

**THE ACT OF CONGRESS OF JUNE 25, 1910 (36 STAT. 825),  
DESIGNATED AS THE "WHITE SLAVE TRAFFIC ACT", IS  
UNCONSTITUTIONAL.**

This point is raised on the motion in arrest of judgment.

(Assignments of Error Nos. I-IX incl.;  
Transcript of Record, pp. 16-18.)

We presume again to advance this contention and to save the point, although we are aware that the Supreme Court of the United States has decided, as applied to the circumstances in the cases that have come before the Court, that the "White-slave traffic Act" is constitutional.

Hoke v. United States, 227 U. S. 308;  
Athanasaw v. United States, 227 U. S. p.  
326;  
Bennett v. United States, 227 U. S. p. 333;  
Harris v. United States, 227 U. S. 340.

We will not attempt, in view of the decisions of the Supreme Court of the United States, upholding

the constitutionality of the “White-slave traffic Act”, to do more than to state the points on which we rely in support of our contention that the “White-slave traffic Act” is unconstitutional and infringes on the police power of the states.

The “White-slave traffic Act” is claimed to derive its constitutional sanction from Subdivision 3, of Section 8, of Article I of the Constitution of the United States, which provides that Congress shall have power “to regulate commerce with foreign nations, and among the several states, and with the Indian tribes”.

We contend that “persons” are not subjects of commerce.

New York v. Miln, 11 Peters, 102;  
License Cases, 5 How. p. 599;  
Bowman v. Chicago & C. R. Co., 125 U. S.  
489.

Congress has no power or authority to punish prostitution within the states.

Congress has no authority to legislate or to make a criminal act anything which may be done in a sovereign state by any person.

The only power Congress has over any person is while such person is “in transitu”.

Lemon v. The People, 26 Barb., (N. Y.) 270;  
aff. in 20 N. Y. 562.

Congress has not prohibited prostitutes from traveling.

The Supreme Court of the United States has repeatedly declared that commerce among the several states shall be “free and untrammelled”.

Welton v. State of Missouri, 91 U. S. 275;  
 Hall v. DeCuir, 95 U. S. 485;  
 Weber v. Virginia, 103 U. S. 344;  
 Passenger Cases, 7 Howard, 283;  
 King et al. v. American Transportation Co.,  
 14 Fed. Cases, 512;  
 Boyse v. Anderson, 2 Pet. 150.

Without further elaborating on this contention, we respectfully submit that the “White-slave traffic Act” is unconstitutional and infringes on the police power of the states.

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## II.

**THE ALLEGATIONS CONTAINED IN THE FIRST COUNT OF THE INDICTMENT, UPON WHICH ALONE PLAINTIFF IN ERROR WAS CONVICTED, ASSUMING THEM TO BE TRUE, DO NOT CONSTITUTE SUCH AN OFFENCE AS WAS INTENDED BY CONGRESS TO BE PROSECUTED BY VIRTUE OF THE ACT KNOWN AS THE “WHITE SLAVE TRAFFIC ACT”.**

This question is raised by Assignments of Error Nos. I, II, III, IV, V, VI, VII, VIII, IX; (see motion in Arrest of Judgment; Transcript of Record, pp. 13-14; pp. 15-18).

These Assignments of Errors distinctly raise the proposition that acts of immorality, such as are alleged in the first count of the indictment upon

which the plaintiff in error was convicted, are not within the letter or spirit of the "White-slave traffic Act".

This is, confessedly, not a case of commercialized vice. The first count of the indictment, upon which the plaintiff in error was convicted, does not allege facts of commercialism in the transportation of Myrtle Kellett, or that the plaintiff in error expected or intended to profit financially thereby. It does not charge that he is a "white-slaver". It does not set forth any facts which place him in the category of a "white-slaver". Myrtle Kellett is not alleged to have been the victim of a "white-slaver", or of a "white-slave plot". It is merely charged that the purpose of the plaintiff in error, in the transportation, was that the "said woman should engage in the practice of debauchery and for other immoral purposes, to wit, that she should live and cohabit with him, the said defendant, in Portland, Oregon, as his concubine". (Transcript of Record, p. 3.) There was not the slightest pretense, on the part of the prosecution, that the purpose of the plaintiff in error savored in the slightest degree of commercialism or that his conduct, in connection with the transportation of Myrtle Kellett was anything more than an escapade or elopement. There was not the slightest pretense, from anything averred in the first count of the indictment or anything else contained in the transcript of record, that, in all her actions, Myrtle Kellett did not act willingly and of her own free

will and accord. The whole theory of the charge contained in the first count of the indictment and of the case of the Government was that although she may have consented, and even begged, to go, or may have induced the plaintiff in error to go, still he is guilty from the mere fact that he went with her and paid for her transportation.

We are, therefore, brought to the threshold of the second proposition advanced in this opening brief, and that is that, as the facts averred in the first count of the indictment, upon which alone the plaintiff in error was convicted, do not make out a case of commercialized vice or of "white-slavery", or that the plaintiff in error profited financially, or intended or expected to profit financially, or share in any profit ensuing, or arising, or expected to arise, from the transportation of Myrtle Kellett and because of any subsequent immoral act or conduct on her part, *there can be no violation of the "White-slave traffic Act"*. In other words, we contend that the "White-slave traffic Act" was intended by Congress to apply only to cases of commercialized vice or of "white-slavery", and not to "des affaires-de-coeur", or escapades such as are alleged in the first count of the indictment and disclosed in the case at bar.

In support of this contention, which we do not understand to have been directly decided in any previous case either in the Supreme Court or the Circuit Court of Appeals, it will be necessary to examine closely the provisions of the "White-slave

traffic Act" and to refer, briefly as possible, to the history of its enactment and the debates of Congress with reference thereto.

The plaintiff in error respectfully contends that the "White-slave traffic Act", *as construed by the trial Court, is unconstitutional*; and he further contends that the *facts disclosed by the allegations of the first count of the indictment could not in any event constitute a crime under the said Act.*

In stating these points for argument and elucidation, we are not unmindful of the rulings of the United States Supreme Court in the cases of Athanasaw v. U. S., 277 U. S. 326; Hoke v. U. S., 227 U. S. 308; U. S. v. Bitty, 208 U. S. 393; nor the several other federal cases construing the Act and reported in the Federal Reporter.

We ask the indulgence of the Court, if we revert to elementary rules of construction and interpretation; but the gravity of the case compels us to present the argument in as clear a light as possible that no injustice may be done the accused.

The Courts will take judicial notice that the traffic in girls and women as prostitutes for gain is a species of illicit commerce. This traffic reached such alarming proportions and became such a menace to society generally that it became necessary for the governments of the world to take formal steps to suppress it. To that end, a conference of nations was called and held in Paris. As a result of that conference the different nations represented,

upon July 25, 1902, entered into "an agreement or project of arrangement for the suppression of the white-slave traffic, \* \* \* for submission to their respective governments." This agreement was made public within the United States, by proclamation of the President, upon June 18, 1908.

35 U. S. Stat. at Large, pt. 2, pages 1979-1984.

For the purpose of carrying out the terms of that international agreement, the "White-slave traffic Act" was passed. It was approved June 25, 1910.

36 U. S. Stat. at Large, 825.

The Courts will further take judicial notice of the illicit traffic as condemned, exposed and generally commented upon in the daily press, magazine articles and books; also as depicted in theatrical plays and moving picture-shows generally immediately preceding and contemporaneous with the passage of the Act.

From these different sources and from general public and private discussions, the terms "white-slave", "white-slaver", and "white-slave-traffic" have now each received a definite meaning in the English language, of which, again, the Courts will take judicial notice.

The Funk & Wagnalls New Standard Dictionary of the English language (New York & London, 1913) thus defines "white-slave":

(Title "slave") "a girl *sold into captivity*." "White slavery", under the title "slavery", is thus defined by quotation: "White slavery, as popularly understood, is that condition to which young and innocent girls are debased when *sold into captivity* for immoral purposes.

"Judge Thomas T. C. Crain in General Sessions, New York, May 26, 1910."

Judge Russell, in U. S. v. Hoke, 187 Fed. 992, on page 1002, makes use of the term "white-slaver" in the following sentence:

"If a state when considering legislation for the suppression of prostitution within its own limits may properly take into view the evils that inhere in that degrading vice, why may not Congress, invested with the power to regulate commerce among the several states, provide that such commerce shall not be polluted by allowing the *white slaver* to transport women and girls from one state to another for the purpose of prostitution and debauchery?"

We thus clearly perceive that there was loud and popular call all over the civilized world for legislation to root out the evil. The popular demand resulted in the enactment by Congress of the Act of June 25, 1910, the Act under which the plaintiff in error was convicted.

Sedgwick on Statutory & Constitutional Law says:

"On the other hand, there is no doubt that very eminent judges have, in the construction of statutes, been wont to permit their minds to be influenced, and in fact to take a sort of judicial cognizance of many intrinsic facts, in regard to which evidence certainly would not

have been permitted, and which, indeed, could not perhaps be proved.

The English statute, 26 Geo. 11, c. 23, declared all marriages of children under age void, unless the consent of the parents or guardians was first obtained. The question was brought before the Kings Bench, whether the act was to be interpreted to include illegitimate children; and Lord Mansfield, in holding that it did so, put his decision on the ground of the mischiefs which the act was intended to obviate: ‘This act was passed in order to prevent the illegal practice of clandestine marriages, which were become so very enormous, that places were set apart in the Fleet and other prisons for the purpose of celebrating clandestine marriages. The Court of Chancery, on the ground of its illegality, made it a contempt of the court to marry one of its wards in this manner. They committed the offenders to prison; but that mode of punishment was found ridiculous and ineffectual. Then this act was introduced to remedy the mischief.’

Sedgwick on Statutory & Constitutional Law,  
pages 241, 242.

Let us look at the Act.

Section 6 recites the Paris Agreement, the President’s proclamation by which it was published to the people of the United States, and the designation of the Commissioner-General as the official in charge of the foreign branch of the traffic, and clearly relates to prostitution and debauchery as a business or commerce and not voluntary sexual intercourse free from any feature of profit or remuneration.

Section 8 classifies the whole Act under one subject and entitled it the “*White-slave traffic Act.*”

Sections 2, 3 and 4 define what acts shall be deemed crimes under the Act and provide penalties for their respective violations.

Sections 1 and 7 define words used in the Act; and Section 5 prescribes the venue for trials.

The true purpose and scope of the "White-slave traffic Act" is nowhere better stated than by Representative Mann of Illinois, the proponent of the "White-slave traffic Act", in submitting to Congress the report from the Committee on Interstate and Foreign Commerce in favor of the adoption of the bill then pending, which subsequently became the "White-slave traffic Act". We set out just such portions of this report as are apposite to this particular phase of our argument:

"THE WHITE SLAVE TRADE:

"A material portion of the legislation suggested and proposed is necessary to meet conditions which have arisen within the past few years. The legislation is needed to put a stop to a *villainous interstate and international traffic in women and girls*. The legislation is not needed or intended as an aid to the States in the exercise of their police powers in the suppression or regulation of immorality in general. *It does not attempt to regulate the practice of voluntary prostitution, but aims solely to prevent panderers and procurers from compelling thousands of women and girls against their will and desire to enter and continue in a life of prostitution.*

The evil, as a present day existing evil of widespread dimensions which has arisen, has been given careful attention by the representatives of most of the civilized nations of the

world, and has been made the subject of an international agreement. Thousands of public-spirited citizens have combined in various National and State organizations for the purpose of lending their aid in its suppression. The *white-slave trade* has been so prevalent that prosecuting officers, both State and Federal, even under inadequate and insufficient laws, have been able to secure many notable convictions. It is an *evil* which many State legislatures have attempted to regulate within the past two or three years by means of the enactment of State statutes. Inasmuch, however, as the *traffic* involves mainly the transportation of women and girls from the country districts to the centers of population and their importation from foreign nations, the evil is one which cannot be met comprehensively and effectively otherwise than by the enactment of Federal laws.

Investigations conducted by Government agents disclose the fact that a national and international *traffic exists in the buying, selling, and exploitation of women and young girls for immoral purposes*. This traffic has come to be known the world over as '*the white-slave trade*'. It is referred to by the Paris conference as '*the trade in white women*'.

There are few who really understand the true significance of the term '*White-slave trade*'. Most of those who have given only a casual thought to the subject have the impression that women who lead immoral lives in public houses are there voluntarily, either because they are attracted by the excitement of such a life or because they have found it an easy way to earn a living. In many cases such is not the fact. The results of careful investigation into this subject disclose the fact that the inmates of many houses of ill-fame are made up largely of women and girls whose

original entry into a life of immorality was brought about by men who are in the *business of procuring women for that purpose*—men whose sole means of livelihood is the money received from the sale and exploitation of women, who, by means of force and restraint, compel their victims to practice prostitution. These investigations have disclosed the further fact that these women are practically *slaves* in the true sense of the word; that many of them are kept in houses of ill-fame against their will, and that *force, if necessary, is used to deprive them of their liberty.*

The characteristic which distinguishes '*the white-slave trade*' from *immorality in general* is that the women who are the *victims* of the *traffic* are *unwillingly forced to practice prostitution*. The term '*white slave*' includes *only* those women and girls who are *literally slaves*—those women who are *owned and held as property and chattels*—whose lives are *lives of involuntary servitude*; those who practice prostitution as a result of the activities of the *procurer*, and who, for a considerable period at least, continue to lead their degraded lives because of the power exercised over them by their *owners*. In short, the *white-slave trade* may be said to be the *business of securing white women and girls and of selling them outright, or of exploiting them for immoral purposes*. Its *victims* are those women and girls who, if given a fair chance, would, in all human probability, have been good wives and mothers and useful citizens.

The preamble of an existing international agreement on this subject states that the several governments, 'being desirous to assure to women who have attained their majority and are subjected to deception or constraint, as well as minor women and girls, an efficacious protection against the *criminal traffic known*

under the name of trade in white women ('*traite des blanches*'), have resolved to conclude an arrangement with a view to concert proper measures to attain this purpose.' It is the purpose of the proposed laws, in so far as it may be possible for Congress to do so, to protect women and girls against this *criminal traffic* by providing for the punishment of those engaged in that *traffic* and by regulations established by the act.

Extensive investigation by government commissions and prosecuting officers in various parts of the country disclose the fact that in many cases involving women and girls imported into this country, and those transported from one state to another, the *procurers resort to all of the means and devices known to the criminal classes to accomplish their purposes. Liquor, trickery, deceit, fraud, and the use of force are resorted to by the procurer to place the girl under his power.* In some cases those who have been induced to come to the large cities are first introduced to the house of prostitution under the influence of liquor; in others, the *procurer* enters into a pretended marriage with his victim; in many cases involving the importation of women and girls from abroad and their transportation from one state to another the inducement is the promise of legitimate employment with handsome compensation. *Hundreds of men in large cities live from the earnings of the victims of the white-slave trade,* and in many instances the more extensive of *international procurers live in affluence.* The books kept by a notorious *importer* of French girls, who was arrested in Chicago a few months ago, disclosed his earnings for the year previous to his arrest, largely from his *importation and wholly from his exploitation of girls;* to have been more than \$102,000.

The investigation into this subject conclusively shows the fact that for some time after they are first unwillingly forced to take up a life of prostitution many of the victims would at once abandon it were it possible for them to do so. The facts are that in order to insure her continuance in the degraded life, to which she has been unwillingly forced to submit, the procurer has resort to physical violence and the maintenance of a system of surveillance which makes her, to all intents and purposes, *a prisoner*. Obviously the portions of the act which require the *proprietor of a house of ill-fame* to report to the Federal authorities concerning the arrival in the establishment of an alien woman or girl would, at least so far as concerns aliens, make *unlawful detention* practically impossible.

The national and international importance of suppressing this *criminal traffic* is clearly shown by reference to the treaty, the preamble of which is given above, and reports of governmental officers and others on the subject.

The Secretary of Commerce and Labor, in his annual report for 1908, page 18, refers to the matter in the following terms:

'It is highly necessary that this *diabolical traffic*, which has attained international proportions, should be dealt with in a manner adequate to compass its suppression. No punishment is too severe to inflict upon the procurer in this vile traffic.'

The act of February 20, 1907, (Sec. 29), created an immigration commission, the membership of which was to consist of three Senators, three members of the House of Representatives, and three persons to be appointed by the President of the United States. In a preliminary report submitted February 27, 1909 (Doc. 1489), the commission says:

'The commission has made an extensive investigation into the question of the importation and harboring of women for immoral purposes. The results show that many women are being regularly imported under conditions which often amount to *absolute slavery*.

\* \* \* \* \*

'It is believed that as a result of this investigation the commission will be able to make recommendations which will put a very decided check upon this horrible traffic, if, indeed, it will not practically break it up entirely.'

#### THE TRAFFIC IS SYSTEMATIC AND EXTENSIVE.

Governmental investigations which have been conducted disclose the fact that the importation of women and girls from foreign countries has been systematic and continuous, and has not been limited to isolated and accidental cases. The facts in connection with investigations conducted by the district attorney at Chicago may be taken as typical of the situation in many other cities.

At the time of the arrest of several notorious French importers in Chicago a large amount of correspondence and other documentary evidence fell into the hands of the authorities. This evidence showed beyond a reasonable doubt that there was in existence an *organized system*, or *syndicate*, having for its purpose the importation of women from foreign countries to Chicago, and other cities in the United States for immoral purposes. This syndicate had headquarters and distributing centers in New York, Chicago, Omaha, Denver, San Francisco, Los Angeles, Seattle, and Nome, Alaska.

It is conservatively estimated, from an examination of the data and information at hand, that the *syndicate* has imported annually during the preceding 8 or 10 years on an aver-

age of about 2000 women,—largely French. It also appears that the syndicate regularly sent agents to Europe to *procure girls* at stated prices, to be brought to the United States, where they were placed at the disposal of the keepers of houses of *prostitution*. The usual methods employed in evading the immigration officers at the port of entry was to pass the women as the wives or sisters of the procurers with whom they arrived.

One of the chief members of this syndicate was the Frenchman Alphonse Dufaur, who was the defendant in six indictments, in the Chicago district, charging him with harboring alien women in violation of the existing law. Dufaur and his wife subsequently forfeited bonds in the sum of \$25,000 and became fugitives from justice.

Another active importer and procurer was Henry Lair, who operates establishments in Chicago and San Francisco. One of Lair's agents was a man named Louis Paint, who some time ago was convicted of importing in New York and who is now serving a sentence of four years in the penitentiary at Atlanta, Ga., for importing women for Lair. On the recent trial of Lair, in Chicago, Paint testified that he had been given \$800 by Lair and told to go to Paris for the purpose of procuring two girls for Lair's establishment in Chicago. Lair was convicted and sentenced by Judge Landis to serve two years at hard labor in the penitentiary at Fort Leavenworth and to pay a fine of \$2500.

Various arrests have been made in the Chicago district which disclose the existence of a *traffic in girls* from Hungary, Sweden, Norway, Denmark, Great Britain, and other countries.

In this connection it is of interest to note the *profits realized by those engaged in the im-*

*portation of alien women for the purpose of prostitution.* For this purpose the information in the possession of the Government, as the result of prosecution against the French procurer, Dufaur, which is definite and accurate, may be taken as typical of the remunerative character of the *traffic*. The books of account kept by Dufaur show that *his income*, from his *establishment in Chicago*, realized largely as a result of his success as an importer, was, for the 12 months immediately preceding his arrest, upward of \$102,000. These books also show that during the month of May, previous to his arrest, the *earnings of one girl, a recent importation*, were \$723. In almost every instance which has come to the attention of the authorities the girls who were imported from France by the *French syndicate* were compelled to turn over every day to the *proprietor of the establishment in which they were detained all their earnings*. They were usually allowed only enough to purchase the clothing necessary to make them attractive to frequenters of the place.

#### INTERNATIONAL AGREEMENT FOR THE REPRESSION OF THE TRADE IN WHITE WOMEN.

A project of arrangement for the *suppression of the white-slave traffic* was, on July 25, 1902, adopted for submission to their respective Governments by the delegates of various powers represented at the Paris conference for the repression of the *trade in white women*.

The stipulations of this project of arrangement were confirmed by preliminary agreement signed at Paris, May 18, 1904, by the Governments of Germany, Belgium, Denmark, Spain, France, Great Britain, Italy, the Netherlands, Portugal, Russia, Sweden, Norway, and the Swiss Federal Council.

By its resolution of March 1, 1905, the Senate of the United States advised and consented to the adhesion by the United States to the said project of arrangement, and therefore, on June 6, 1908, the President announced the adherence on the part of this Government to the project, and this adherence was on June 15, 1908, covered by the proclamation of the President. This treaty was published in pamphlet form by the State Department as Treaty Series, No. 496, and a complete copy is attached hereto as Appendix B. The preamble of this agreement recites that the various Governments, being desirous to assure to women who have attained their majority, and are subjected to deception or constraint, as well as minor women and girls, an efficacious protection against the *criminal traffic known under the name of trade in white women—‘traite des blanches’*—have resolved to conclude an arrangement with a view to concert proper measures to attain this purpose.” (See Congressional Record, Vol. 50, pp. 3368, 3370, 3371.)

Where the language of a statute is ambiguous or doubtful, it is well settled that resort may be had to the history of the act.

“Both the *debates*, however, and the *reports of committees* may be consulted for the purpose of ascertaining the *general object of the legislation proposed* and the *evils* sought to be *remedied*.”

36 Cyc., pp. 1138 and 1139, and cases there cited;

Holy Trinity Church v. U. S., 143 U. S. 457;  
36 L. Ed. 226.

Even the *title* of the *Act* may be referred to as tending to throw light upon the legislative intent of its *scope or operation*.

Said Mr. Justice Brewer in *Holy Trinity Church v. U. S.* supra :

“We find, therefore, that the *title of the Act*, the *evil which was intended to be remedied*, the *circumstances surrounding the appeal to Congress*, the *reports of the Committees of each House*, all concur in affirming that the intent of Congress was simply to stay the influx of this cheap unskilled labor.”

To the same effect, see *Binns v. U. S.*, 194 U. S. 486.

*Coosaw Mining Co. v. So. Car.*, 144 U. S. 563.

In ascertaining the intent of a statute, especially the remarks of the member in charge of the bill, are important and of value.

Cyc., Vol. 36, pp. 1138, 1139;  
*U. S. v. Wilson*, 58 Fed. 768;  
*Ex p. Farley*, 40 Fed. 66.

The Act was passed by Congress under the grant of power contained in Art. 1, Sec. 8, subd. 3, of the Constitution,—known popularly as the “interstate commerce clause”.

From what we have said, it will be apparent, without citation or argument, that the traffic in female human beings—the procuring, selling or using for financial profit—comes directly, and not by implication, within the meaning of the word “commerce” as used in the Constitution.

However, the trial Court, we respectfully submit, conceived a wrong impression of the nature and scope of the Act.

It is upon this that we predicate an assignment of error among several others on the same general subject.

A perusal of the Act will readily disclose where the Court obtained its erroneous conception.

The title of the Act is misleading. At first reading, one would readily conclude that the subject was "An Act to prohibit the *transportation* for immoral purposes of women and girls". Again, the first section would lead one to the same conclusion, wherein it says:

"That the term 'interstate commerce' shall include transportation from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia."

The subject of the Act, however, as expressed in the title, is: "An Act to further regulate interstate and foreign *commerce*"; and the first section merely recites that the term "interstate" shall include state, territory and the District of Columbia. In other words, the Act is for the purpose of further regulating interstate and foreign *commerce*, and not an Act to regulate the *transportation* of women and girls for immoral purposes, as erroneously conceived by the trial Court.

Let us now elucidate by applying a few rules of construction and interpretation.

“Laws are expounded and enforced, not made, by the Courts. The makers are entitled to have their real meaning, if it can be ascertained, carried out. Hence the *primary object* of all rules for interpreting statutes is to ascertain the legislative intent; or, exactly, the meaning which the subject is authorized to understand the legislature intended. Hence, also, if the Courts can ascertain the legislative meaning, their duty is to give it effect, whatever may be the personal opinions of the incumbents of the bench on the policy of the law.”

Bishop on Statutory Crimes, 3rd Ed., Sec. 70.

“It is indispensable to a correct understanding of a statute to enquire first what is the subject of it. When the subject matter is once clearly ascertained and its general intent, a key is found to all its intricacies; general words may be restrained to it, and those of a narrower import may be expanded to embrace it to effectuate that intent. When the intention can be collected from the statute, words may be modified, altered or supplied so as to obviate any repugnancy or inconsistency with such intention. \* \* \* In the Eureka case, Mr. Justice Field said: ‘Instances without number exist where the meaning of words in a statute has been enlarged or restricted and qualified to carry out the intention of the legislature. The enquiry, where any uncertainty exists, always is as to *what the legislature intended, and when that is ascertained it controls.* \* \* \*’”

Vol. II Lewis’ Sutherland’ Statutory Construction, 2nd Ed. Sec. 347.

"In United States v. Minn., 3 Sumn. 209, 211, Fed. Case No. 16,740, Mr. Justice Story said that the proper course is 'to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonize best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature'. To the same effect are United States v. Morris, 14 Pet. 464, 10 L. Ed. 543; American Fur. Co. v. United States, 2 Pet. 358, 367, 7 L. Ed. 450, 453; United States v. Lacher, 134 U. S. 624, 628, 33 L. Ed. 1080, 1083, 10 Sup. Ct. Rep. 625; Sedgw. Stat. & Const. Law, 2nd Ed. 282; Maxwell, Interpretation of Statutes, 2nd Ed. 318."

U. S. v. Bitty, 208 U. S. 393.

Reverting to the case at bar.

What was the intent of Congress in enacting "The White-slave traffic Act"? From what sources do we, or can we, ascertain such intent?

(1) The congressional intent is expressed in the title:

"An Act to further regulate interstate and foreign *commerce* \* \* \*."

(2) The congressional intent is expressed in Section 6 of the Act:

"And in pursuance of and for the purpose of carrying out the terms of the agreement or project of arrangement for the *suppression of the white-slave traffic*, adopted July twenty-fifth, nineteen hundred and two, for submission to their respective governments by the delegates of various powers represented at the Paris Conference and confirmed by a formal agreement signed at Paris on May eight-

eenth, nineteen hundred and four, and adhered to by the United States on June sixth, nineteen hundred and eight, as shown by the proclamation of the President of the United States, dated June fifteenth, nineteen hundred and eight, \* \* \* .”

(3) The congressional intent is expressed in Section 7 of the Act, wherein it is provided that a corporation, company, society or association may be guilty of a violation of the provisions of the Act, and this rule of construction is prescribed:

“The word ‘person’, as used in this Act, shall be construed to import both the plural and the singular, as the case demands, and shall include corporations, companies, societies, and associations. When construing and enforcing the provisions of this Act, the act, omission, or failure of any officer, agent, or other person, acting for or employed by any other person or by any corporation, company, society, or association, within the scope of his employment or office, shall in every case be also deemed to be the act, omission, or failure of such other person, or of such company, corporation, society, or association, as well as that of the person himself.”

(4) The congressional intent is expressed in Section 8 of the Act wherein it defines and entitles the Act as the

“White-slave traffic Act.”

“White-slave, a girl *sold into captivity* for immoral purposes.”

Standard Dictionary, supra.

Holy Trinity Church v. U. S., 143 U. S. 457;  
36 L. Ed. 226.

(5) The congressional intent is expressed in the caption of the President's Proclamation, referred to in Section 6 of the Act (35 Stat. at Large, pt. 2, p. 1979) :

“Agreement between the United States and other Powers for the *repression of the trade in white women*. Signed at Paris, May 18, 1904; ratification advised by Senate, March 1, 1905; adhered to by the President, June 6, 1908; proclaimed June 15, 1908.”

(6) Also in the first paragraph of the Proclamation:

“Whereas a project of arrangement for the *suppression of the white slave traffic* was, on July 25, 1902, adopted for submission to their respective Governments by the delegates of various Powers represented at the Paris Conference for the *repression of the trade in white women*.”

(7) Also in the preamble of the International Agreement, referred to and made a part of the President's Proclamation (35 St. at Lg., pt. 2, pp. 1980-1984) :

“His Majesty the German Emperor, \* \* \*, being desirous to assure to women who have attained their majority and are subjected to deception or constraint, as well as to minor women and girls, an efficacious protection against the *criminal traffic* known under the name of *trade in white women* ('Traite des blanches'), have resolved to conclude an arrangement with a view to concert proper measures to attain this purpose \* \* \*.”

(8) Also in Article 6 of the Agreement, which recites:

“The contracting Governments agree, within the limits of the laws, to exercise, as far as possible, a supervision over the bureaus or agencies which occupy themselves with finding places for women or girls in foreign countries.”

(9) Further, in the action of the Senate upon the Agreement (Vol. 39 Cong. Rec., pt. 4, p. 3770):

“Repression of the *trade in white women*.

“The injunction of secrecy was removed March 1, 1905, from projects of a convention and an additional arrangement adopted on July 25, 1902, by the delegates of the various Powers represented at the Paris conference for the repression of the *trade in white women (traite des blanches)*.”

In these several documents it will be seen that the terms “*trade in white women*” and “*White slave traffic*” are used interchangeably, and the words “*trade*” and “*traffic*” as being synonymous.

A few definitions may aid in bearing out our contention. They are quoted from The Century Dictionary (N. Y. 1913):

“*Slave*”—“A person who is the chattel or property of another and is wholly subject to his will; a bond-servant; a serf.”

“*Slave-trade*”—“The trade or business of procuring human beings by capture or purchase, transporting them to some distant country, and selling them as slaves; traffic in slaves.”

“*Trade*”—“8. The exchange of commodities for other commodities or for money; the business of buying or selling; dealing by way of sale or exchange; commerce; traffic.”

“Traffic”—“1. An interchange of goods, merchandise, or other property of any kind between countries, communities or individuals; trade; commerce.”

(10) The congressional intent is disclosed by the history of the Act, the debates in Congress and the reports of committees.

Holy Trinity Church v. U. S., 143 U. S. 457;  
36 L. Ed. 226.

(11) The congressional intent is shown by the contemporaneous construction given the Act by the executive departments of the Government.

U. S. v. Ala. R. R. Co., 142 U. S. 621;  
U. S. v. Finnell, 185 U. S. 236, 244; 46 L. Ed.  
890;  
New York v. New York City R. R. Co., 193  
N. W. 543, 86 N. E. 565.

It is hardly necessary, however, to go outside the Act to ascertain the intention of Congress to suppress the White-slave traffic,—the abominable practice of enticing, coercing, buying and otherwise procuring girls to be enslaved in prostitution, debauchery and other immoral practices for the profit and gain of their masters—white slavers. It is not necessary to refer to the newspaper, magazine or platform demand for legislative action prior to and contemporaneous with the passage of the Act.

Could any other intent be deduced? If there can, let counsel for the United States point it out.

Having thus ascertained the “true intent of the legislature”, to use Mr. Justice Story’s language, *supra*, “we must adopt that sense of the words which harmonize best with the context and promotes in the fullest manner the apparent policy and objects of the legislature”.

Applying this rule to Sections 2, 3 and 4 of the Act, it will be seen, at a glance, that they *solely* refer to any “*person*”. But, by Section 7 of the Act, the word “*person*” is made to include a “corporation, company, society, or association”, engaged in the interstate traffic in *white-slaves* or women to be used for immoral practices. It will not be seriously claimed that a “corporation, company, society, or association” is capable of sexual intercourse. Yet the use of the words “corporation, company, society, or association”, shows that Congress had in mind the fact that a “corporation, company, society, or association” might engage, equally with a person, in the illicit business or commerce of bartering in girls and women for profit or gain.

We deem this conclusive.

A more appropriate title for the Act would, perhaps, have been, “An Act to further regulate interstate and foreign commerce by prohibiting therein the trade or traffic in white women to be used as slaves in commercialized vice”.

None of the allegations of the first count of the indictment in the case at bar attempts to show the

plaintiff in error a “white-slaver”. There is not a scintilla of the slightest commercialism in the case at bar. The whole theory of the case, from its inception, was based upon the erroneous conception that the Act covered all cases of immoral interstate conduct. The prosecution, as well as the Court, labored under this grossly erroneous interpretation of the Act. The erroneous conception, as we have before stated, consisted of the idea that it was an Act to regulate *transportation*—that the jurisdiction of the Court rested upon the right to regulate interstate *transportation*, instead of the right to regulate interstate *commerce*.

This leads to the construction to be placed upon the word “commerce” as used in the Federal Constitution.

We respectfully contend that the word “commerce”, as employed by the framers of the Constitution, implies a means to a financial, pecuniary or other like remunerative end,—traffic or trade for emolument or compensation. That this meaning is basal. That we unconsciously imply such meaning whenever we employ the word.

Bearing this fundamental definition in mind, let us apply some elementary rules of construction and examine some of the leading cases which have construed this word in the Constitution.

“48. It is a *cardinal rule* in the interpretation of constitutions that the instrument must be so construed *as to give effect to the intention of the people who adopted it.*”

“Where the meaning shown on the face of the words is definite and intelligible, the courts are not at liberty to look for another meaning, even though it would seem more probable or natural, but they must assume that the constitution means just what it says.”

“3. A constitution should be construed with reference to, but not overruled by, the doctrines of the common law and the legislation previously existing in the state.”

Black’s Constitutional Law, 2nd Ed. Secs.

48-49.

“The court should put itself in the position of the legislature,—should stand, in contemplating the statute, where the maker of it stood—the better to discern the reason and scope of the provision. They who voted for the measure must have had in mind a meaning for the enacted words; and the meaning, thus perceived, must be given them by the Court. Thus, ‘Time,—If the statute is old, or if it is modern, the court should transport itself back to the time when it was framed, consider the condition of things then existing, and give it the meanings which the language as then used, and the other considerations, require.’”

Bishop on Stat. Crimes, 3rd Ed. Sec. 75.

“In a book not strictly of the legal class we read: ‘No sentence or form of words can have more than one true sense’; and this only one we have to enquire for. This is the very basis of all interpretation. \* \* \* Every man or body of persons, making use of words, does so in order to convey a certain meaning; and to find this precise meaning is the object of all interpretation. To have two meanings in view

is equivalent to having no meaning, and amounts to absurdity'."

Same, Sec. 94.

"Adopted from other state or country.  
 \* \* \* In the adjudications on this question, no nice distinctions have been drawn; but, in a general way, it is held that a word, phrase or statutory provision, adopted from the laws of another state, or from England, \* \* \* will ordinarily receive the construction it had in the law whence it was taken."

"Constitution.—In pursuance of the presumed intend of the makers, a constitutional provision, adopted from another state after it had been judicially interpreted, will, in the absence of any contrary indication, retain the meaning thus previously ascertained."

Same, Sec. 97.

"Looking to the subject for the meaning, if a statute employs a word which, though not legal, is technical to its subject, we give it the technical sense,—not the general sense, not one technical to another subject,—unless something appears indicating a different intent of the legislature. Thus,—

"An act relating to commerce is interpreted by the vocabulary of merchants, not of mechanics."

Same, Sec. 99.

"Ordinarily the language is to be understood in its common signification; as, for instance, general terms are to receive their general, not restricted sense."

Same, Sec. 102.

“Our constitutions, being, like statutes, written instruments and laws, are, in the main, similarly interpreted.”

Same, Sec. 92.

“Believing, as I do, that the success of free institutions depends on a rigid adherence to the fundamental law, I have never yielded to considerations of expediency in expounding it. There is always some plausible reason for the latitudinarian constructions which are resorted to for the purpose of acquiring power,—some evil to be avoided, or some good to be attained, by pushing the powers of the government beyond their legitimate boundary. It is by yielding to such influences that constitutions are gradually undermined, and finally overthrown. My rule has ever been to follow the fundamental law as it is written, regardless of consequences. If the law does not work well, the people can amend it; and inconveniences can be borne long enough to await that process. But if the legislature or the courts undertake to cure defects by forced and unnatural constructions, they inflict a wound upon the constitution which nothing can heal. One step taken by the legislature or the judiciary in enlarging the powers of the government opens the door for another, which will be sure to follow; and so the process goes on, until all respect for the fundamental law is lost, and the powers of the government are just what those in authority please to call them.”

Oakley v. Aspinwall, (N. Y.) 3 Coms. 547, 568.

Having these fundamental principles in mind, we will proceed to apply them to the word “commerce” as used in the Constitution.

Our first step will be to place ourselves in the constitutional convention—revert to Philadelphia, Pennsylvania, as of September 17, 1787,—the date of the adoption.

The next step will be to ascertain what that convention understood by the word “commerce” when the delegates caused it to be inserted into Subd. 3, Section 8, of Article 1 of our Federal Constitution.

As we have seen, resort may be had to prior laws—to the English common law—the law adopted by this country and so adopted at about that time. Therefore, the highest authority we could find to enlighten us upon the subject would be the definition given it by Blackstone himself. Sir William Blackstone completed his Commentaries in 1765, just twenty-two years prior to the drafting of our Constitution. No one will argue that any different meaning crept into the law during this interim. Blackstone’s definition of both foreign and domestic commerce will be found on pages (original paging) 273 to 278, subdivision V. In part, it is as follows:

“V. Another light in which the laws of England consider the King with regard to domestic concerns, is as the arbiter of commerce. By commerce, I at present mean domestic commerce only. It would lead me into too large a foreign trade, its privileges, regulations, and restrictions; and would be also quite beside the purpose of these commentaries, which are confined to the laws of England; whereas, no municipal laws can be sufficient to order and determine the very extensive and complicated

affairs of *traffic and merchandise*; neither can they have a proper authority for this purpose. For, as these are transactions carried on between subjects of independent states, the municipal laws of one will not be regarded by the other. For which reason the affairs of commerce are regulated by a law of their own, called *the law merchant* or *lex mercatoria*, which all nations agree in, and take notice of. And in particular it is held to be part of the law of England, which decides *the causes of merchants* by the general rules which obtain in all commercial countries; and that often, even in matters relating to *domestic trade*, as for instance, with regard to the drawing, the acceptance, and the transfer of inland bills of exchange.

“With us in England, the King’s prerogative, so far as it relates to mere domestic commerce, will fall principally under the following articles:

“First the establishment of *public marts*, or places of *buying and selling*, such as *markets and fairs*, with the *tolls* thereunto belonging. These can only be set up by virtue of the King’s grant, or by long and immemorial usage and prescription, which presupposes such a grant. The limitation of these *public resorts* to such time and such place as may be most convenient for the neighborhood, forms a *part of economics*, or domestic polity, which, considering the kingdom as a large family, and the King as the master of it, he clearly has a right to dispose and order as he pleases.

“Secondly, the regulation of weights and measures. These, for the advantage of the public, ought to be universally the same throughout the kingdom; being the general criterions which reduce all things to the same or an equivalent *value*. \* \* \*”

"Thirdly, as money is the *medium of commerce*, it is the King's prerogative, as the arbiter of domestic commerce, to give it authority to make it current. Money is a universal medium, or common standard, by comparison with which the *value of all merchandise* may be ascertained; or it is a sign which represents the respective *values of all commodities*."

Chancellor Kent's commentaries (N. Y., Nov. 23rd, 1826) on the subject of commerce is also instructive.

Commentaries on American Law, Vol. 1, pp. 32-34; 431-439.

Not only in these works, but in all definitions of the word found in the text books and reported cases, the fundamental conception of the word "commerce" will be found to include a transaction for a monetary or pecuniary gain. Of course, the word is broad and includes within its meaning any ancillary subject, such, for instance, as the federal government jurisdiction over navigable waters wholly within a state.

(Act of Sept. 19, 1890.)

In other words, as we gather from Mr. Blackstone's definition, the first principle of the word in its, perhaps we might say, barbaric sense, is trade or barter. To this, the English law had included the subject of weights and measures and the coinage of money. Still other auxiliary subjects have also been construed as being included within the meaning of the word, but a close study of them all will disclose that the earliest conception of the

word is still retained,—commercial intercourse for gain.

Judge Russell, in U. S. v. Hoke, 187 Fed. 992, has cited a number of cases which construe this section of the Constitution.

The first subject commented upon is that the power to regulate commerce includes the power to regulate the transportation of passengers. The jurisdiction of Congress to exercise this power in interstate travel, we do not question. We have no desire to quarrel with the United States Supreme Court regarding any of its decisions on this subject. We agree implicitly with that Court upon this subject. The common carrier of passengers is undeniably engaged in a commercial pursuit, the traffic for gain. The contract for carrying—evidenced by a ticket—is a commercial transaction and should be regulated by the state. The common carrier is engaged in a purely commercial enterprise and his business should be regulated. The passenger, as long as his contract of carriage is executory, is, to a more or less extent, subject to observe certain rules, regulations and laws which Congress directly, or through its agents, may impose. To this extent, therefore, Congress, under this constitutional power, regulates the passenger as well as the carrier. But this regulation of the passenger has its beginning and its end in the contract of carriage—the contract for gain entered into by the common carrier engaged in a commercial enterprise. For instance: Should Congress

pass a law, in furtherance of the public safety, forbidding passengers to stand upon the platform of a car while the train was in motion and prescribing a penalty to be imposed upon the passenger for its violation, it would be a constitutional law in interstate travel. Likewise, a federal interstate law forbidding expectorating on the floor or platform of an interstate train would be another instance.

But outside the scope of the contract of carriage the jurisdiction does not exist. For instance: Congress could not enact a law making it a federal offense for a person to purchase a ticket in one state, and, riding on a common carrier into another state, with malice aforethought for the express purpose of committing the crime of murder in such other state. In such case, the regulation would be the regulation of a criminal, not the regulation of a passenger.

The subject of the law would be the prevention of and punishment for a criminal offense. The fact that the defendant was an interstate passenger would be a mere incident. The intent of Congress, as expressed in such an Act, would be to prevent and punish for crime. In no sense, could it be construed as an Act to regulate interstate commerce. It would be an attempt to usurp a purely police power, which, under our laws, is vested exclusively in the several states. The same rule would apply were the wrong merely one of immorality. Suppose the Act one where Congress attempted to make it a federal offense for a man to travel from one

state into another to have sexual intercourse with a prostitute or to debauch a woman, or attend an extremely immoral exhibition. What would be the subject of such an Act? What would be the "legislative intent" as expressed in the Act? Purely an attempt on the part of Congress to suppress or regulate immoral acts and the contract of passage on the common carrier merely an incident in no manner connected with the wrong sought to be prohibited. No barter, trade or traffic for gain would be involved in the commission of the offense itself—no act of a commercial nature would enter into the wrong doing. Congress would, in such a case, be attempting to regulate morals—not interstate travel. Again, would it make it any more of a commercial transaction should the woman to be debauched go in company with the accused? The offense would be the same and the subject of the Act identical. As said by Mr. Justice Brewer in *Keller v. U. S.*, 213 U. S. 138; 53 L. Ed. 737; 29 Sup. Ct. Rep. 470; 16 A. & E. Ann. Case, 1066, at page 149, a case decidedly in point here:

"While the acts of Congress are to be liberally construed in order to enable it to carry into effect the powers conferred, it is equally true that prohibitions and limitations upon those powers should also be fairly and reasonably enforced."

That Congress has police power is not to be denied; but, as Mr. Black says:

"It is true that Congress has no general power to make police regulations for the people

of the United States, nor has it authority to interfere, in matters not committed to its exclusive jurisdiction, with the internal affairs of the states, under the pretense of police regulations."

Black's Cons. Law, 3rd Ed. 391-2.

The same author further says (p. 435) :

"Yet a state has the same unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation, where that jurisdiction is not surrendered or restrained by the federal constitution, and 'all those powers which relate to merely municipal legislation, or what may perhaps more properly be called internal police, are not thus surrendered or restrained, and consequently in relation to these, the authority of a state is complete, unqualified, and exclusive.'

"A deliberate purpose to place the state police power under federal control can hardly be attributed to the framers of the constitution."

See also:

Freund Police Power, Sec. 65;

Bishop on Stat. Crimes, 3rd Ed., Sec. 990;

Tiedman's Lim. of Police Power, Sec. 201.

The subject of the act construed in the Rahrer case was intoxicating liquors—a commercial subject. (140 U. S. 545, 35 L. Ed. 572.)

The subject of the Addyston Pipe case was iron pipe—another commercial subject. (175 U. S. 211, 44 L. Ed. 136.)

The subject of the Popper case was the traffic in instruments intended to prevent conception—the

selling of a commercial article in interstate trade. (179 U. S. 305, 45 L. Ed. 203.)

The subject of the act construed in the Lottery cases is expressed in its title: "An act for the suppression of lottery traffic \* \* \*." A trading in lottery tickets for gain—a pernicious commercial transaction. (188 U. S. 321, 47 L. Ed. 492.)

And so on with the others mentioned: The anti-trust act; the act prohibiting the interstate trading in misbranded or mislabeled dairy products; the pure food law; the act prohibiting interstate traffic in gold and silver branded "United States Assay". These are all laws regulating commercial transactions—traffic or trade for gain—or articles of commerce—merchandise.

And, so do we agree with Judge Russell where he says, on page 1004 of the Hoke case:

"I might go ahead and mention numbers of instances where the regulatory power of Congress as contained in the Constitution has been invoked for prohibiting the transportation from place to place of certain articles, and the courts have well settled the proposition that the power of Congress to regulate the transportation of persons differs in no particular or degree from its power to regulate the transportation of property and things."

*Provided*, that such persons are transported in the sense of articles of commerce—subjects of remuneration to those dealing or trading in or with them—as the objects of financial or pecuniary profit to the one transporting them. In this connection

we do not mean the *common carrier*, but the *white-slaver*.

*Otherwise*, were the Act intended to “regulate the transportation of persons”, then the common carrier corporation, through its agents, would be guilty of a violation of the Act should any such agent sell an interstate ticket to a woman whom such agent knew intended to engage in prostitution, debauchery or other immoral practice—which construction would be absurd.

This latter would be the *regulation of the passenger traffic*; while the former would be the *regulation of the white-slave traffic*.

It may be contended that as one meaning of the word “commerce” is “sexual intercourse”, that that is sufficient to confer upon Congress jurisdiction to regulate such intercourse among the citizens of different states.

As we have seen, a word can have but one “true meaning”—and that controls.

The word “commerce” also means “a game of cards, played in various ways”. But we do not expect counsel to insist that this would confer jurisdiction on Congress to regulate interstate poker, whist or five-hundred.

We do not think it necessary to argue that neither of these meanings, nor any other meaning than the one we have given, was intended by the framers of our Constitution.

Taking all the testimony and evidence submitted in the case at bar to the jury as true, all the acts, commissions and omissions of the defendant combined would merely show an act of immorality, insofar as the United States is concerned.

That the white-slave traffic is pernicious and should be stamped out, we agree. But that the Act covers mere interstate sexual intercourse immorality, we most emphatically deny. In this connection, we believe that we have conclusively shown that the view taken by the trial Court, of the object and scope of the Act, is unconstitutional. That the Act covers the subject *only* which it itself expressly says it covers—the *traffic or commercial dealing in women and girls as prostitutes or for debauchery, or any other immoral practices*. That had Congress intended that the Act should cover all interstate immoral acts, as the trial Court ruled throughout the trial and instructed the jury it did, in such a case the Act would be unconstitutional, such immoral conduct not amounting to an act of *commerce* within the meaning of the constitution.

Keller v. U. S., *supra*;

*Ex parte Gouyet*, 175 Fed. 230.

All the cases, in which the Act has been construed, have been cases within the object and scope of the statute as we have construed it. That being the case, none of them is in point here. As we have before said, we have no quarrel with any of the Courts which have heretofore held this law constitu-

tional as applied to the facts disclosed in the reported cases.

Take, for example, the case of Hoke et al. v. United States, 227 U. S. 308, 57 L. Ed. 523. It clearly appears that Effie Hoke kept a house of prostitution and that the trial Court "permitted the woman to testify as to the acts of Effie Hoke at her house at Beaumont, restraining the liberty of the women and coercing their stay with her". It also appeared that the women transported were prostitutes. As stated by the Supreme Court:

"There was sufficient evidence, as the trial Court said, of the fact of the immorality of their lives, and explicitly ruled that they could be shown to be public prostitutes."

Furthermore, the indictment in the Hoke case charged that the transportation was "for the purpose of prostitution", whereas, in the case at bar, there is no such allegation or pretense. It is simply charged that Myrtle Kellett was transported for an immoral purpose, to wit: "that she should live and cohabit with him, the said defendant, in Portland, Oregon, as his concubine."

Next, take the case of Bennett v. United States, 227 U. S. p. 333, 57 L. Ed. 531. It appears that that, also, was a case involving the transportation of women for a commercial and immoral purpose, to wit, prostitution.

The same is true of the case of Harris v. United States, 227 U. S. p. 340, 57 L. Ed. 534. That, also, was a case of commercialized vice.

Next, considering the case of Athanasaw et al. v. United States, 227 U. S. p. 326, 57 L. Ed. 528; it also affirmatively appears that that was a case of commercialized vice. The facts, as stated by the Supreme Court of the United States, show that the girl, in that case, was 17 years old and was transported ostensibly to become a chorus girl at the Imperial Theatre, Tampa, Florida. The theatre was operated by the defendants, and their agent or booking representative at Atlanta had engaged her and furnished her transportation. She arrived at Tampa and met the defendant Athanasaw.

"As to what then took place, the girl testified as follows: 'He showed me to my room and took the check to get my trunk. I went to sleep and slept until 2 o'clock in the afternoon. At that hour one of the girls woke me up to rehearse. I went down in the theatre, and stayed there about an hour, rehearsing, singing, and then went to lunch in the dining room. All of the girls were there and several boys. I had never had any stage experience. At lunch they were all smoking, cursing, and using such language I couldn't eat. After lunch I went to my room, and about 6 o'clock Louis Athanasaw, one of the defendants, came and said to me I would like it all right; that I was good looking and would make a hit, and not to let any of the boys fool me, and not to be any of the boys' girl; to be his. *He wanted me to be his girl; to talk to the boys and make a hit, and get all of the money I could out of them.* His room was next to mine, and he told me he was coming in my room that night and sleep with me; and he kissed and caressed me. He told me to dress for the show that night and come down to the boxes. I went into the box about 9 o'clock.

About that time Louis Athanasaw's son knocked on my door and told me to come to the boxes. In the box where I went there were four boys; they were smoking, cursing, and drinking. I sat down and the boys asked me what was the matter; I looked scared. I told them I was ashamed of being in a place like that; and Arthur Schleemann, one of the boys said he would take me out. The others insisted on my staying, and *said I would like it when I got broke in.* I tried to go out with Schleemann, but a boy named Gilbert pulled me back, saying "Let that cheap guy alone". Schleemann said he would send a policeman, and in about fifteen minutes Mr. Thompson and Mr. Evans came in for me.' "

That, undoubtedly, was a case of commercialized vice or a "white-slave case", within the letter and spirit of the "White-slave traffic Act". The girl in that case was transported for "the purpose of debauchery", as the indictment there alleged. There was present the element of commercialism. She was to "*get all of the money I (she) could get out of them*", a clear case of commercialized vice.

How different are the facts alleged in the first count of the indictment in the case at bar!

Next, take the case of U. S. v. Bitty, 208 U. S. 393; 52 L. Ed. 543, and it will be found to be clearly distinguishable from the case at bar. The defendant, in that case, was convicted under an Act of Congress passed in the exercise of its jurisdiction with reference to *foreign immigration*. That jurisdiction is not founded upon the *commerce* clause of the Constitution, but "upon the inherent and in-

alienable right of every sovereign and independent nation to regulate immigration in furtherance of its safety, independence and welfare.”

See note to Keller v. U. S., 16 A. & E. Ann. Cas. 1069.

Even Mr. Mann, the author of the “White-slave traffic Act”, differentiates the case of U. S. v. Bitty and concedes that the facts disclosed in that case do not come within the purview of the “White-slave traffic Act”. The report of the Committee on Interstate and Foreign Commerce, submitted by Mr. Mann, sets out:

**“SUPREME COURT DECISION CONSTRUING SECTION  
3 OF THE ACT OF FEBRUARY 20, 1907.**

“Section 3 of the Act of February 20, 1907, has received the consideration of the Supreme Court in two cases.

“In the first case, that of the United States v. John Bitty (208 U. S. 393), the Supreme Court held that a foreign woman being brought to the United States as the personal, private mistress of a man living here was being imported ‘for other immoral purposes’, and that, therefore, the importer was subject to the penalty of the statute and the woman to deportation.

“THIS DECISION IS NOT PERTINENT TO THE PHASE OF THE SUBJECT UNDER DISCUSSION, AND IS MENTIONED ONLY IN PASSING.” (Congressional Record, Vol. 50, p. 3369.)

Furthermore, the Congressional history of the Act, as disclosed by the report of the House Committee on Interstate and Foreign Commerce,

through Mr. Mann, the author of the "White-slave traffic Act," clearly discloses that the purpose and scope of the "White-slave traffic Act" was to affect cases of *commercialized vice only* and not mere voluntary sexual intercourse unaccompanied with any mercenary object or gain. The report declares, among other things:

**"POLICE POWERS OF THE STATES NOT INTERFERED WITH.**

It is not the purpose of the bill to interfere with or usurp in any way the police powers of the states. The bill reported does not endeavor to regulate, prohibit, or punish prostitution or the keeping of cases where prostitution is indulged in. The prohibition of prostitution and other immoral practices and the punishment of the practice of prostitution or the keeping of houses of ill fame, or other immoral places, in the several States, are matters wholly within the powers of the States and the Federal Government has no jurisdiction over those subjects. On the other hand, it has been shown in the investigation relating to the 'White-slave traffic' that persons engaged in that business in some of the large cities felt quite free to engage in the traffic as between the States, when they hesitated about engaging in the traffic wholly confined in one State.

**PROVISIONS OF THE BILL.**

Most of the provisions of the bill are based upon the power of Congress over interstate and foreign commerce."

\* \* \* \* \*

"The sections above proposed have been so drawn that they are limited to cases in which there is the act of transportation in interstate commerce of women for purposes of prostitu-

tion. The use of interstate commerce in sending prostitutes from one State to another in connection with this traffic in women would seem to be as directly connected with interstate commerce as the sending of tickets from one State to another in furtherance of the operation of a lottery. It is true that the act of prostitution is not committed in connection with the interstate transportation nor was the drawing in connection with the lottery a part of interstate commerce."

\* \* \* \* \*

#### “THE WHITE SLAVE TRADE.

A material portion of the legislation suggested and proposed is necessary to meet conditions which have arisen within the past few years. The legislation is needed to put a stop to a villainous interstate and international traffic in women and girls. The legislation is not needed or intended as an aid to the States in the exercise of their police powers in the suppression or regulation of immorality in general. *It does not attempt to regulate the practice of voluntary prostitution, but aims solely to prevent panderers and procurers from compelling thousands of women and girls against their will and desire to enter and continue in a life of prostitution.*” (Congressional Record, Vol. 50, pp. 3368, 3370.)

In addition to all of the reasons advanced by us, in support of the contention we make that the “White-slave traffic Act” was intended by Congress to apply only to cases of commercialized vice, we insert an official expression of the views of the Department of Justice of the United States, through its Attorney General, which has been called to our attention, as follows:

"DEPARTMENT OF JUSTICE  
Office of United States Attorney  
District of Minnesota.

St. Paul, July 17, 1912.

The Attorney General,  
Washington, D. C.

Sir: I have to honor to submit for your direction and advice the facts in a case which is claimed to come within the purview of the Act of June 25, 1910, called the 'White-Slave Traffic Act'.

One Ada Cox, twenty-four years of age, residing at Chicago, Ill., came to St. Paul in October, 1910, at the solicitation and expense of one Rufus Edwards. On her arrival here, Edwards met her at the station. They passed the day riding, lunching and drinking, and the night followed at a house of assignation in the city of Minneapolis. She remained there three days with Edwards and then returned to Chicago. In June, 1911, she repeated this visit under like circumstances.

June 12, 1912, Miss Cox applied to me for a warrant of arrest of Edwards under the above named act. At that time she made a statement of her connection with Edwards which was taken in shorthand by Mr. J. M. Dickey, Assistant United States Attorney, in this office, and by him written out.

A copy of this statement is enclosed.

Careful consideration of the facts and circumstances as related by Miss Cox fail to convince me that her case came within the spirit and intent of the Mann act. *The element of traffic is entirely absent from this transaction.* It is not a case of prostitution or debauchery and the general words 'or other immoral practice' should be qualified by the particular preceding words and be read in the light of the rule of *Eiusdem Generis*. This view of the statute is the more reasonable when considered

*in connection with Section 8 where Congress employs the terms 'slave' and 'traffic' as indicative of its purpose to suppress certain forms of abominable practice connected with the degradation of women for gain.*

Since I have hesitated about having a warrant issued for the arrest of Edwards, Miss Cox has enlisted certain club women in her behalf who are insisting on the arrest being made.

As this case is typical of many others that are liable to be brought to this office I deemed it proper to submit the facts to ascertain if my interpretation of the statute is in harmony with the departmental construction.

Very respectfully yours,  
 (Signed) Chas. C. Houpt,  
 United States Attorney."

"DEPARTMENT OF JUSTICE,  
 Washington, D. C.  
 July 23, 1912.

United States Attorney,  
 St. Paul, Minn.

I have received your letter of the 17th instant concerning a statement of the facts with reference to the complaint of one Ada Cox, against one Rufus Edwards of an alleged violation of the White Slave Traffic Act.

*I agree with your conclusion that the facts and circumstances set forth in your letter and its enclosure do not bring the matter within the true intent of the White Slave Traffic Act, and that no prosecution against Edwards should be instituted in the federal courts unless other and different facts are presented to you.*

Respectfully,  
 (Signed) Geo. W. Wickersham,  
 Attorney General."

In addition to this expression of opinion, we respectfully refer to similar views in other in-

stances expressed by the Hon. Attorney General and to be found in Congressional Record, Vol. 50, pp. 3354 et seq., especially page 3366.

It is a settled rule of statutory construction that where the language of a statute is ambiguous or otherwise doubtful, or, being plain, a literal construction could lead to such absurdity, hardship or injustice, as to render it irrational to impute to the law-making power a purpose to produce or permit such result, the contemporaneous construction given by an executive department of the Government is of value in endeavoring to ascertain the legislative intent.

Said the Supreme Court of the United States, in the case of U. S. v. Ala. R. R. Co., 142 U. S. 615-616, 612; 35 L. Ed. 1134 and 1136:

“We think the contemporaneous construction thus given by the executive department of the Government \* \* \* a construction which, though inconsistent with the literalism of the Act, certainly consorts with the equities of the case,—should be considered as decisive in this suit.”

Said the Supreme Court of the United States in the case of U. S. v. Finnell, 185 U. S. 236, 244; 46 L. Ed. 890, 893:

“Of course, if the departmental construction of the statute in question were obviously or clearly wrong, it would be the duty of the court to so adjudge. \* \* \* But if there simply be doubt as to the soundness of that construction \* \* \* the action during many years of the department charged with the execution of

the statute should be respected, and not overruled except for cogent reasons."

In the case of *New York v. New York City R. Co.*, 193 N. Y. 543; 86 N. E. 565, it was held that when the meaning is doubtful a practical construction by those for whom the law was enacted, or *by public officers whose duty it was to enforce it*, is entitled to *great influence*, but the ambiguity must not be captious, but should be so serious as to raise a reasonable doubt in a fair mind, reflecting honestly upon the subject.

See also, statement of the rule and cases collated in Vol. 36 Cyc., pp. 1139, 1142.

Another error committed by the trial Court in interpreting the "White-slave traffic Act", was in giving to the words, "debauchery, or for any other immoral purpose," a much broader meaning than was the intent of Congress in enacting that law. The trial Judge construed these words as comprehending *any* act of sexual intercourse, even though it was voluntary and absolutely free from any element of commercialism or mercenary gain or profit.

We admit that whatever of doubt or ambiguity there is in the "White-slave traffic Act" arises from the words "*debauchery, or for any other immoral purpose*". If given the broad and comprehensive meaning accorded to them by the trial Judge in the case at bar, we respectfully contend that they subvert the intent and purpose of the "White-slave

traffic Act" and give the Act a much broader scope and operation than was intended by Congress. If given the less broad interpretation, for which we contend, these words are then given their proper meaning, one which accords with the intent and purpose of Congress in passing the law.

We have seen, from other rules or canons of construction and interpretation, that it was, clearly, the intent of Congress that the highly penal provisions of the "White-slave traffic Act" should apply *only* to cases of *commercialized vice*. This view is further confirmed by taking into consideration the use of the words, "debauchery, or for any other *immoral purpose*". We submit that the trial Judge was not justified in treating those words as applicable to *any* act of voluntary sexual intercourse absolutely free from any element of commercialism or mercenary gain or profit, such as is disclosed by the facts in the case at bar. The "White-slave traffic Act" makes use of the words, "prostitution or debauchery, or for any other *immoral purpose*", and again in the same section, "to become a prostitute or to give herself up to debauchery, or to engage in any other *immoral practice*". It will be observed that the words "*purpose*" and "*practice*" are used interchangeably in the several sections, evidently having in mind various other and baser forms of immorality practiced for commercial gain by women and girls. A perusal of the "White-slave traffic Act" discloses that in Section 2 the words "*purpose*" and "*practice*"

are used alternately and twice in that section. In Section 3 they are used once alternately: In Section 4 the word "practice" seems to be substituted for the word "purpose" in the expression "any other immoral purpose". In Section 6 neither of the expressions "any other immoral purpose" or "any other immoral practice" seems to be used in the first paragraph of this section. A reference is simply made to "the transportation in foreign commerce of alien women and girls for purposes of *prostitution* and *debauchery*". In the second paragraph of Section 6, however, will be found the expression, twice repeated, "any other immoral purpose".

Obviously, the word "practice", used generally throughout the Act interchangeably with the word "purpose", imports something more than a single act of sexual intercourse without a commercial design or purpose. "Practice", as defined by the lexicographers, signifies, *inter alia*, some act or function that we exercise or pursue as an occupation; as, to practice law. (Cent. Dic., Vol. 6, p. 4665.) The word should, therefore, be given this expressive meaning in order to correspond with the evils sought to be eliminated by the passing of the law, and, thus construed, *the vindictory* part of the law has application only to those who attempt to exercise or follow acts of immorality as a vocation.

"Prostitution", of course, refers to commercialized vice. The words following it, "debauchery,

or for any other immoral practice (purpose)," under the rule of construction known as "ejusdem generis", where general words follow the enumeration of particular classes of persons or things, will be construed as applicable only to persons or things of the same general nature or class as those enumerated.

Cyc., Vol. 36, pp. 1119, 1122, and case there collated.

This rule is especially applicable to statutes defining crimes and regulating their punishment.

State v. Erwin, 91 N. C. 545;  
Lane v. State, 39 Ohio St. 312;  
Ex. p. Muckenfuss, 52 Tex. Cr. 467; 107  
S. W. 1131;  
State v. Goodrich, 84 Wis. 359; 54 N. W. 577;  
Reg. v. Reid, 30 Ont. 732.

Under this rule of construction, the words "or debauchery, or for any other immoral *purpose*", and again the words "or to give herself up to debauchery, or to engage in any other immoral *practice*", undoubtedly should be construed as applicable only to "prostitution", or, in other words, as applicable *only* to *commercialized vice*. The obtaining, furnishing, or bartering in young girls for the purpose of "*debauchery*", by which we understand that expression to mean the pollution or ruining of young girls, is a species of traffic in young girls and women just as much as the obtaining, furnishing or bartering of more seasoned girls and women for the purposes of prostitution. The

further expressions “other immoral *purpose*” and other immoral *practice*”, are undoubtedly used in the same connection and refer to immoral practices too revolting to discuss, to which young girls and women may be subjected, or which they may “practice” for profit or gain.

Likewise, “in accordance with the maxim ‘*noscitur a sociis*’, the meaning of a word used in a statute must be construed in connection with the words with which it is associated. Where several words are connected by a copulative conjunction, they are presumed to be of the same class, unless a contrary intention appears”.

See statement of this rule of construction in Vol. 36, of Cyc., pp. 1118, 1119, and cases there collated.

It is a well known fact that there is a radical difference of opinion between federal Judges, expressed in the trial of cases brought under the “White-slave traffic Act” as to the proper scope and operation of that Act. Some federal Judges, as did the trial Judge in the case at bar, have held that any act of sexual immorality, even though free from any element of commercialism or profit or gain to the person furnishing the transportation, is within the intent and purpose of the Act; while others have held, in accord with the construction we maintain, that the scope and operation of the Act is limited to cases of commercialized vice only. Among the latter Judges, we beg to refer to District Judge Pollock, of Kansas, whose charge to the

jury in a case brought under the "White-slave traffic Act" we incorporate in this opening brief, as a part of our argument. This charge is as follows:\*

*"In The  
District Court of The United States  
for the  
District of Kansas  
Second Division*

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CHARGE TO JURY BY HON. JOHN C. POLLOCK IN  
UNITED STATES VS. LEE BAKER  
SEPTEMBER 23, 1913.

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Gentlemen of the jury, you have now listened with care to the trial of this case up to this point when it becomes my duty under the law to charge you as to the law which shall govern you in your deliberations on a verdict in this case. You understand, gentlemen of the jury, in courts of justice where cases are tried before the court and a jury, the responsibility is evenly divided between the court and the jury. The duty of the court under our form of laws is to declare the law of the case, and it is the duty of the jury to take the law precisely as declared by the court, for, if there be any mistake made in a matter of law, it is the mistake of the court and the court is responsible for such mistake. On the other hand, it is the duty of the jury to determine the facts from the evidence, and if a mistake be made in that matter it is a mistake of the jury and not of the court. The jury must trust the court implicitly to correctly declare the law, and the court must trust the jury to correctly find the facts in a given case from the

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\* Note.—This charge was reported by S. A. Buckland, an attorney at law at Wichita, Kansas, and was printed in pamphlet form by that gentleman after its revision by Judge Pollock, and we have inserted the entire charge from a printed copy.

evidence which is offered and received on a trial of the case before the jury; and if the jury unite the true facts of the case to the law as declared by the court in the verdict returned—whenever that is done, justice in our courts is properly administered; whenever it is not done for any reason, then justice is not properly administered.

Now then gentlemen of the jury I shall endeavor to state to you what it is that we are trying in this case today. In this case Lee Baker was presented to the Grand Jury and the Grand Jury returned an indictment against him in two counts under what is commonly known as the Mann Act or White Slave Law that was some time since passed by our Congress. I shall read that law to you in a moment that you may become familiar with its terms. You understand, gentlemen of the jury, in a general way, in framing this Government of ours, the States that were then in existence for themselves, and for all other States that should be created thereafter, framed what we call a Federal Constitution, and that the Federal Constitution and the laws of Congress which are enacted in pursuance of our Constitution are the supreme law of this country. It is binding upon the States just as well as upon the individuals. In doing that, as I have said, the States that were then in existence, and each State that has come into existence since, has agreed the Constitution and the laws of Congress enacted in pursuance of that Constitution shall be the supreme law of this country. That is the reason that Congress takes control of certain matters which are regulated by Federal law. The States were absolutely incompetent to regulate commerce between the different States, so they committed that matter to Congress, and the Congress of the United States under the Federal Constitution declares all laws

and rules which relate to commerce between the several States, among the several States and with foreign countries. Now what is known as the 'White Slave Law' was enacted by Congress under what is known as the commerce clause of the Constitution; that is, it relates entirely to commerce between the different States of this country. Now you know in a general way there are certain matters that the State alone has power to deal with and the Federal Government has no power to deal with. Our States regulate our laws as to marriage and divorce. Our States define in their statutes what is adultery, what is bigamy, what is fornication; all these are matters over which Congress has no control and no concern whatever. It is absolutely impossible in a government situated as is ours for the Federal Government to have any thing to say as to how people shall be married, and who are properly married and divorced. It is just as impossible under our form of government for the United States to define the crime of adultery where committed within the borders of a State. It is for the States to punish for that matter, but it is within the power of Congress to regulate and control interstate commerce, that is, commerce from one State to another.

There are two counts in this indictment based on two distinct offenses which are prescribed by the law, and I will read the law and refer to the indictment. (Reads Section.) (2) Section 2 of the act on which is based the first count of this indictment reads as follows: (Reads Section 2.) As I have said to you, the first count of this indictment is based upon the section that I have read; that count reads as follows: \* \* \* present Lee Baker on or about the 28th day of June, 1912, in said District and within the jurisdiction of said Court at the City of Peabody, then and there being

did unlawfully, knowingly and feloniously transport or cause to be transported from the City of Peabody in the State of Kansas to the City of St. Joseph in the State of Missouri, one Cora Slover, then and there being a woman under the age of eighteen years for the purpose of prostitution or other immoral practices, the exact nature and character of said prostitution or other immoral practices being to the Grand Jury unknown, he the said Baker furnishing railroad transportation over the Chicago, Rock Island & Pacific Railway from the City of Peabody in the State of Kansas to the City of St. Joseph in the State of Missouri.

Now, gentlemen, this act has not only been held constitutional by the Supreme Court of our country, but the Congress had the undoubted power to enact it for the purpose of regulating and keeping clean commerce between the States under the commerce clause of our national Constitution. The object and purpose of Congress in the passage of this act was to break up the practice of those engaged in procuring women or girls in one State of our country and transporting or assisting in transporting them into another State to then become inmates of a house of prostitution, or to prostitute their persons in promiscuous sexual intercourse; in other words, to become or engage in the business of a prostitute; again, to prevent any one from transporting or assisting in transporting from one State into another State or Territory of our country any woman or girl under any guise, arrangement or device whatever for the purpose of there debauching or causing such woman or girl to be debauched by sexual intercourse, or other immoral practices which will cause her to live in a state of debauchery; or, to prevent any one from transporting, or assisting in transport-

ing any woman or girl in such interstate commerce from one state to another for any such immoral purpose as will or may lead her into a life of prostitution or debauchery.

This is a criminal prosecution by indictment, hence it devolves upon the government to make out the case charged in this indictment before you can convict, beyond a reasonable doubt. By that term, reasonable doubt, is meant exactly what it says; a reasonable doubt; such a doubt as will cause a thinking, prudent, reasonable man to hesitate before engaging in the graver or more important affairs of life. When any of the jury have in their minds an abiding conviction the defendant must be guilty as charged,—when they have reached that state of mind—they no longer have any reasonable doubt. The defendant in this case admits he did take this girl Cora Slover at about the time charged from Peabody to St. Joseph in the State of Missouri; that is to say, that he did travel in interstate commerce. He says he was going to the city of St. Joe for the purpose of getting business in his occupation; that the girl went with him and that it was not his intention when he furnished this transportation, when he engaged in this interstate commerce with the girl that she should engage in prostitution or debauchery, but that they were engaged to be married and expected to be married. He travelled with her to St. Joseph and that they there lived together. *If what the defendant says in that relation is true he is not guilty under this law, because at the time this transportation was entered upon and carried out in this State he must have knowingly furnished this transportation to this girl knowing or intending that she should become a prostitute or should engage in debauchery or such other immoral sexual practice.* Now it is the contention of

the Government, and this evidence was offered to show with what mind the defendant furnished this transportation, that this defendant did at St. Joseph, Missouri, request and endeavor to induce others to engage in sexual intercourse with this woman, who is now under this testimony, his wife. Now that was offered for the purpose of showing what his mind was at the time he furnished this transportation, the intent. If he was furnishing this transportation with the intent that she should enter a house of prostitution, or should help him in any way by selling her body, to help him along, then he is guilty under this law. *If, on the contrary, he was going to St. Joseph for the purpose of looking for a position where he could ply his business and that was his honest intent, and the girl wanted to go along, as she says she did, and it was not his intent that she should engage in prostitution, debauchery or immoral practices, then he is not guilty.* The burden of proving this charge beyond a reasonable doubt is on the Government.

There is another section of this statute which I shall read and under the evidence in this case I find but little or any reason for submitting it. The third section reads: (Reading same.) That section of the statute is meant to cover cases when one entices another to travel in interstate commerce or does things inducing them for the purpose of having them engage themselves in prostitution or in such immoral practices or debauchery as will lead to sexual immorality and eventually to prostitution, but in this case, under the evidence, there is no evidence that he did induce her to go with him. *The evidence is that she was really the one who wanted to go with the defendant;* so then as far as the second count of the indictment is concerned there is no evidence of inducing her to accompany him. *She says she wanted to go*

and no one induced her to accompany him. She had no place to stay and wanted to go with him; so the question after all in this case is with what purpose did the defendant furnish this transportation to this girl Cora Slover at the time it was furnished, and what was his intention in that matter at the time that he engaged in this interstate commerce. If he knowingly furnished her transportation and took this girl with him to St. Joseph for the purpose of prostitution on the part of the girl, or that she should there become through himself and others so debauched that she necessarily would become a prostitute, then the defendant is guilty and you will so find; believing the contrary, the Government has failed to convince you that is true as charged in this indictment, then you will find him not guilty. Again, suppose these folks were engaged to be married; suppose he was going to St. Joseph with the legitimate purpose of engaging there in business; suppose this girl wanted to accompany him; if at the time they travelled from Peabody to St. Joseph and his motives were honest and his intentions toward the girl good; and if he did not intend that she should engage in prostitution or debauchery or other immoral acts after they got there; if that was the intention in his mind at the time he travelled; and after they got there they lived together as man and wife, that was a question for the State authorities of Missouri, and not for the Federal Government, because, as I have said, what constitutes adultery, what constitutes bigamy, and what constitutes living in a state of fornication, all those questions are matters for the State. So what did this man intend? That is the question for your determination. Now, gentlemen, I have said, you are the exclusive judges of the credibility of the witnesses, the weight of the evidence and the facts as proved. Take

this case and consider it as far as the law is concerned as I have charged you.

There is another section that doubles the punishment in case the girl furnished the transportation, as in section two, or, is induced to go, as under section three, is under eighteen years. The evidence is, I believe, that the girl at the time this transportation was furnished was under eighteen, but the punishment is left, if you find the defendant guilty, with the discretion of the court between certain extremes.

You will now retire to your jury room and consider the case. I have caused four forms of verdict to be prepared; one relating to each of the two counts of the indictment, one finding the defendant guilty on the first count of the indictment, if you so find; one finding him not guilty on that count, if you so find; also, two forms of verdict relating to the second count in the same manner, and I send the indictment and these four forms of verdict with you."

Finally, in urging upon the Court the contention, made by us throughout the entire trial of the case in the Court below, that the "White-slave traffic Act", in its intent, scope and operation, was intended by Congress to apply to cases *only* of *commercialized vice*, we remind this Court that the "White-slave traffic Act" is a highly penal statute and that it should be strictly construed, and that, if there be any doubt and ambiguity in some of the verbiage of the Act, that doubt or ambiguity should be resolved against the Government and in favor of the individual. As was well said in the case of *Hackfeld v. U. S.*, 197 U. S. 442:

"This is a highly penal statute and we think the well known rule as laid down by Chief

Justice Marshall in U. S. v. Wiltberger, 5 Wheat. 76, 95: ‘The rule that penal statutes are to be strictly construed is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of the individual.’”

In concluding our argument on this phase of the case, we respectfully submit that the facts alleged in the first count of the indictment, assuming them to be true, do not bring the plaintiff in error within the scope and operation of the “White-slave traffic Act” and that a reversal must follow and the plaintiff in error be discharged and permitted to go hence without day.

Dated, San Francisco,

March 2, 1915.

Respectfully submitted,

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